SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1973

No. 73-1178

JAY POBLINER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Jay Pobliner, prays that a writ of certiorari issue to review a judgment of the New York State Court of Appeals dated May 4, 1973 affirming the decision and order of the Appellate Division of the Supreme Court, State of New York, Second Judicial Department, dated June 26, 1972, which in turn affirmed a judgment of conviction of petitioner after a jury trial in the County Court, Nassau County, State of New York on December 9, 1970 for the crime of Murder and which also affirmed a subsequent order of the County Court, Nassau County, denying a post-conviction application by the petitioner in the nature of coram nobis. Petitioner received an indeterminate sentence of from twenty-five years to life imprisonment. Petitioner also seeks review of an order of the

Court of Appeals of the State of New York entered September 18, 1973 which denied petitioner's motion for reargument with respect to said judgment of affirmance.

Opinion Below

The Appellate Division of the Supreme Court, State of New York affirmed the judgment of conviction of the County Court, Nassau County unanimously, without opinion. However the Court of Appeals of the State of New York under date of May 4, 1973 published its full opinion, a copy of which is annexed hereto as Appendix A and is officially reported at 32 N.Y. 2d 356, which opinion respondent relies upon in the instant proceeding before this Honorable Court. On September 18, 1973 petitioner's motion for reargument in the Court of Appeals was denied, without opinion, and a copy of this order is annexed hereto as Appendix B.

Jurisdiction

The jurisdiction of this Court is apparently sought under Rule 19 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 1257 (3), it being argued that respondent violated petitioner's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by the use of unlawful wiretap evidence and further the Court additionally deprived petitioner of his rights to due process of law by granting a prosecution witness immunity and by failing to have the jury consider the question of whether or not the prosecution witness Hall was an accomplice. Petitioner sought and was granted an extension of time to file his petition for a writ of certiorari by order of this Court dated December 7, 1973 which extended the time to file the petition to February 16, 1974, a copy of such order being appended in petitioner's Appendix marked Appendix D.

Constitutional Provisions Involved

Respondent deems the reproduction of the Fourth, Fifth, and Sixth Amendments to the United States Constitution as set forth in petitioner's Appendix E, at page A-419, sufficient for purposes of this petition.

Statement of the Case

Introduction and Summary of Argument

Pre-indictment wiretap does not mandate dismissal of indictment or reversal; cross-examination of Jurisson proper; petitioner waived right to formal wiretap hearing; trial evidence untainted; certain wiretapped conversations not priviledged; immunity properly granted Scudder; and jury charge proper.

The petitioner was convicted in the County Court, Nassau County, State of New York, after a jury trial for the crime of murdering his wife and he was sentenced as aforesaid to not less than twenty-five years nor more than his natural life. An application for a stay of the judgment of conviction and for bail pending appeal was denied in the State courts in 1971 (*People* v. *Pobliner*, 66 Misc. 2d 209, 320 N.Y. Supp. 2d 257) and petitioner has been since incarcerated.

Brenda Pobliner was shot to death by her husband, Jay, as she lay sleeping in her bed at Merrick the morning of December 27, 1968. The killing was the outgrowth of a matrimonial dispute. It was the theory of the prosecution that the murder was witnessed by Illis Jurisson, a friend of petitioner, though admittedly Jurisson never confessed he observed the shooting.

Petitioner discussed killing his wife with Edward Gaines, Evelyn Rice, and he admitted to Joe Hall he killed his wife in the presence of Jurisson. Rice and Hall were friends of petitioner from the Asheville area of North Carolina. The sufficiency of the evidence identifying petitioner as the killer was not challenged by the appeal in the State Courts.

The claim has been the judgment of conviction must be reversed and the indictment dismissed because the police at the investigation stage wiretapped certain conversations between petitioner and his attorney, Herbert Handman.

From the outset, the District Attorney in good faith believed Jurisson had, indeed, witnessed the shooting. Moreover, independent of the wiretap, the police were fully informed Jurisson was on the verge of a nervous breakdown. To guard against the possibility Jurisson would speak the truth, the People contended petitioner's lawyer placed Jurisson in the Gracie Square Hospital where Jurisson received a string of shock treatments. Jurisson was escorted to the hospital by Herbert Handman, personal friend and lawyer of Petitioner. Moreover, the bill was paid for by petitioner's family.

Respondent argued it was apparent the police were investigating not only the murder of Brenda Pobliner but a conspiracy to bribe and tamper with a key witness. At the heart of the conspiracy was Herbert Handman, friend, confidant and attorney of petitioner at the investigation stage of the case.

In the State Court of Appeals, the People contended the challenged police action was proper because: (1) the police acted in good faith; (2) Handman was not only counseling petitioner about his rights in connection with the murder of Brenda Pobliner. He was believed to be masterminding a conspiracy to spirit away an eyewitness to the killing, and to put a series of shock treatments between Jurisson and the Grand Jury. There was nothing privileged about such conduct or conversations.

Alternatively, respondent argued that if the court concluded the police acted improperly, the judgment must, nevertheless, be affirmed because: (1) wiretap evidence was not introduced at the trial; (2) fruits of the wiretap were not received in evidence against petitioner.

In fact, petitioner pointed to not a single item of evidence which was the subject matter of an eavesdrop or procured as a direct result thereof. He did argue the District Attorney improperly used wiretap evidence to cross examine Illis Jurisson about his hospitalization and shock treatments. In point of fact, the police knew of the hospitalization of Jurisson apart from the wiretap. Moreover, these facts were first fully developed by Maurice Edelbaum, Esq., on the direct examination of Jurisson. The cross examination complained of by the District Attorney came about not because of the wiretap but an independent investigation, coupled with the direct examination by defense counsel. Finally, there was no objection by the defense to the cross examination now challenged.

Petitioner also insisted (1) the trial judge did not conduct a proper hearing to determine if wiretap evidence led to the proof adduced at the trial; (2) the wrong standard of proof in such case was employed by the trial judge. The District Attorney argued to the contrary.

Petitioner further contended he did not receive a fair trial because the evidence of blood including the bullet wound in Brenda's head was inflammatory. Also, it was prejudicial to prove petitioner was having an affair with another woman when he murdered Brenda in her sleep.

The District Attorney argued the blood-bullet evidence was not unlawful whereas the evidence of petitioner's infidelity proved his motive for the shooting.

Petitioner urged the judgment should be overturned because the District Attorney improperly drew a guilty inference from petitioner's silence while in custody when questioned. The District Attorney denied all.

The charge was challenged because the trial judge did not instruct the jury that as a matter of law, or at least

as a question of fact, Joe Hall was an accomplice. The District Attorney argued there was no possible view of the evidence that would permit or sustain the indictment of Hall as a principal in the murder of Brenda Pobliner. Moreover, there was no objection or request to charge so the legality of the instructions was not reviewable by the Court of Appeals.

Petitioner maintained the trial judge was mistaken in not ordering a hearing after judgment in connection with a post-conviction motion. In support of the motion, a hearsay affidavit of a private investigator was submitted that Harriet Pollack, a close friend and neighbor of petitioner, if called, would contradict the testimony of Adele Pober and Donald Pober, two prosecution witnesses. Adele Pober testified she discovered the deceased after an early morning call from petitioner whereupon she called her husband, Donald, who notified petitioner to go home. Both Adele and Donald Pober insisted Adele did not tell Donald that Brenda had been shot to death. It was significant because after receiving the telephone call from Donald Pober, petitioner told three people about his wife before returning home.

Petitioner insisted Harriet Pollack would testify Adele and Donald Pober admitted to her that Adele told Donald of the shooting and Donald told petitioner of his wife's murder. Moreover, according to the affidavit of the investigator, Harriet Pollack also told the District Attorney during the trial that the Pobers admitted telling petitioner that his wife was shot to death.

Clearly, the motion was properly denied without a hearing because petitioner in an earlier motion for a new trial submitted an affidavit charging Maurice Edelbaum, trial counsel, failed to represent him properly because Edelbaum knew about Harriet Pollack's story, and refused

to call her as a witness for the defense. If Maurice Edelbaum did not believe Harriet Pollack at the time of the trial, the judge did not have to order a hearing after judgment. It is to these propositions that my brief shall be directed.

The Evidence

Planning and Preparation for the Murder.

Edward Gaines (733* *et seq.*) was a long time friend of petitioner who testified he discussed killing his wife with petitioner during September 1968. According to Gaines, petitioner thought it a good idea and agreed to kill his wife too. Continuing, Gaines testified petitioner suggested they go to Asheville, North Carolina, for New Year's Eve and kill their wives in the mountains. As a precaution, petitioner advised Gaines to get a cheap pair of rubbers and a raincoat (738-739). The discussions continued throughout the Fall and early Winter of 1968 between Gaines and petitioner. The upshot of Gaines' testimony is that he thought it all a joke.

Gaines concluded his direct testimony by declaring that about a month after the murder of Brenda Pobliner, he asked petitioner if he had killed his wife (743). The witness was sorry he asked the question so he turned away (744). When he looked back, "Jay had his head in his hands and he was crying" (744). Continuing, Gaines testified petitioner "told me it was a very, very, rough time, that there was yelling and screaming, and he told me it was a lucky thing that it wasn't my wife who was killed, because I wouldn't have been able to hold up under the pressure" (745).

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*References are to page numbers of printed record on appeal in the New York State Court of Appeals.

It may have been all a joke to Gaines but it is clearly apparent that petitioner was serious because his marriage was breaking up. In October of 1968, petitioner met Mrs. Lilliane Scudder (655 *et seq.*) who also lived in Merrick. According to the Scudder woman, petitioner complained that his wife was "a good woman and a good wife" (657) but she was "cold" (658) and no longer interested in doing "the things that he liked to do" (657). Continuing, the Scudder woman testified she would meet petitioner in bars along the south shore where they would drink and talk. On the third date, they landed in a motel room in Freeport where they had sexual relations (658-660). It was the testimony of the Scudder woman that she engaged in sexual relations with petitioner on ten to twelve different occasions in a Freeport motel, and at least once in petitioner's home during the Fall and early Winter of 1968 (661-662; 669-671).

Moreover, it is undisputed petitioner made no secret of his affection for Lilliane Scudder for she testified petitioner invited her to his place of business in New York where he introduced her to his partner (663-665). Additionally, petitioner introduced her to his son by the first marriage. Further, petitioner gave the Scudder woman a ring for her birthday (666) and a wristwatch for Christmas (666-667).

It is readily apparent from the trial testimony that petitioner's extramarital affairs during the Fall and early Winter of 1968 were pressing on the deceased. For example, Gaines testified he went to dinner with petitioner and both men were accompanied by their wives. Gaines testified the deceased complained that an old girlfriend of Pobliner's was calling him regularly from North Carolina (748). According to Gaines, Jay told him to contact Joe Hall, Asheville, North Carolina, who would

give him the name of the girlfriend. Gaines was to relay the identity of the girlfriend to petitioner who would contact her and advise her not to make any calls to his home (748). The girl turned out to be Evelyn Rice (758; 1165 *et seq.*).

It was during this period, November 1968, that petitioner flew to Asheville, North Carolina, with his wife and a friend, Alfred Pezold, also known as Butch Pezold, under the pretext of going hunting. According to Butch Pezold (1158 *et seq.*) the party had dinner at an Asheville restaurant with Joe Hall, a long time friend and confidant of petitioner. Thereafter, they went to Hall's night club named "Some Place Else" where he met Evelyn Rice.

Joe Hall (811 *et seq.*) testified petitioner made a date to meet him at his club on Sunday at a time when the club was closed. According to Hall, petitioner wanted an unregistered gun. On Monday evening, petitioner returned with his girlfriend, Evelyn Rice, to inquire about the unregistered gun. Hall testified petitioner pressed him for the weapon by Wednesday so he bought a "black frontier colt revolver .22 with white pearl handles, single action" which resembled a "western gun, like a cowboy gun of some sort" (817) from Glenn Bell, a co-worker of Hall's at a local radio station. The weapon was turned over to petitioner by Hall in the pantry of "Some Place Else" Wednesday evening, along with a yellow box containing 50 rounds of .22 calibre copper-clad or copper-jacketed bullets (817-818; 855-856; 995-998; 1009).

According to Hall, he received a $50 check from petitioner earlier but the gun cost $80 so petitioner gave him the balance in cash. The check proved to be worthless (819; 933-940).

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Continuing, Hall testified Pobliner " 'dry fired it a couple of times' " (819) but quickly put it away when an

off-duty policeman employed by Hall at the club walked into the pantry (819).

According to Hall, about midnight, petitioner "said he needed to speak to me, that it was something very, very important." He said that he and a friend of his here in New York, by the name of Eddie, were planning to kill their wives and that he needed my help, that he wanted me to obtain a car for him, that he and Eddie and their wives were going down to North Carolina the 30th of December. He also made reservations at my club for him and his wife, for Eddie and his wife, and about three or four policemen and their wives, and I asked him, I said: "You're going to kill her? For why?" and he said, "Well, she's just not the same Brenda that we used to know, that she doesn't like to go out and have a good time. All she likes to do is just sit around the house and just bitch and gripe all of the time." (820)

Continuing, Hall testified petitioner "told me that he would tell me that he would lay out a definite plan when he got back from New York to tell me where to park an automobile, that they would drive their wives to this point where the car was, and that he would shoot his wife, but she wouldn't know anything about it and he would do it very, very gently without any—without any fear to her, that he would take the pistol, slip it behind her head and fire." (820)

Hall asked petitioner where he intended to kill his wife and petitioner replied in a "remote section of town" (820).

Continuing, Hall testified that petitioner told him he planned "to make it look like a robbery" (821).

At this point, Hall asked petitioner " 'Why not get a divorce or separate' " (821). According to Hall, petitioner insisted " 'Well, I'll think about it' but, he says 'it just won't work, Joe. I know it won't work' he says, 'this is the only way' " (821).

Hall insisted that petitioner wanted to give him $2,500 for helping him but he didn't want it (824). On the night of December 27, 1968, Hall received a message to call petitioner at his father's home in Manhattan which he did. Hall described the call as follows: (825)

> "Well, he asked me how come I hadn't contacted him earlier and that it was very tragic what had happened, and I asked him, I said, 'What kind of gun was she killed with?' And he says, 'Well, one newspaper says it was a foreign made 9 millimeter gun and another newspaper said it was a .22, but I have a feeling it was the .22' He also told me that the Nassau County Police Department were using gestapo methods on him and were very brutal, that they had had he and his friend Illis under the lights for approximately fourteen hours questioning them and that they had given them tests and that when they had Illis, they would tell Illis that Jay had done it and that they were confessing back and forth, just trying to trick them into getting a confession."

Continuing, Hall testified petitioner warned him that the police "would probably be bugging his phone and not to say anything over the phone that I called him at his apartment, that if I wanted to talk to him, to call him at the apartment or at work, and that he would set a time to call me from a pay phone, where we could talk, where there would be no bug on the phone" (825).

Continuing, Hall testified to a series of telephone calls between petitioner and himself wherein they discussed the investigation by the Nassau County Police Authorities both in New York and North Carolina. According to the witness, petitioner counseled him what to say. "He told me if the police were to come down to the club or if they were to get in touch with me and tell me that Jay had confessed, that

I had sold him the gun, that I was to deny it and to stay with my original story, and also say that if Jay was going to kill Brenda, that he would have certainly done it here in Asheville, where he had police connections and so on, instead of in New York" (828).

Hall testified he next saw petitioner in the latter part of January, 1969, at the Memorial Mission Hospital, Asheville, where Hall put it squarely up to petitioner who shot his wife. According to the witness, peitioner "took his thumb and pointed to himself and he said, I did * * * he told me, he says, 'I did it, but I feel that I didn't do it and I am very sorry that I did it, and I want you to feel the same way' " (831).

According to Hall, petitioner confessed that he killed his wife with the .22 Colt that he had given him previously and threw it in a river (831-832).

Hall testified the petitioner hated to get rid of the gun because it was "pretty" (832). After shooting his wife, he fixed a bottle for the baby and put it to sleep before leaving.

Hall also testified that he asked about petitioner's friend Gaines and did he kill his wife also. According to the witness, petitioner declared he backed out (832).

Hall also testified that petitioner told him Illis Jurisson "was standing right beside me" when he shot Brenda and "Illis was there for an alibi and that the police cannot get to Illis now because Illis was in a mental institution and Illis was one hell of an actor" (832-833).

Hall also testified that petitioner told him Brenda "was asleep when he shot her, and he said that she was asleep and that she never knew what hit her" (833).

According to Hall, petitioner boasted that he wore gloves and used his jacket to defeat any possible paraffin test (833).

Hall testified that when petitioner described shooting his wife, he clicked his tongue three times indicating he had shot Brenda three times (833-834).

Petitioner assured Hall he wasn't worried, "that he had one hell of a smoke screen built" (834), that his family thinks he is the "greatest guy going" (834). "He said that he had hired one of the best and most expensive criminal lawyers in New York, that his father was a very good friend of the Attorney General of New York, that he had a private detective working on the case, that he had hired a criminologist to work on the case, that he had put up a $10,000 reward and they had flashed it all over television for the capture of the killer, that he had hired Lieutenant Wellborn in Asheville, North Carolina to handle the case in Asheville" (835).

Pobliner boasted that Illis was there as an alibi and was right beside him when it happened (836). Moreover, petitioner bragged he put on a very convincing act at the funeral when he "kissed Brenda in the coffin" (836).

Hall was a patient at the hospital when this conversation took place. He insisted that petitioner wanted to give him some money but that he refused, and finally petitioner stuck $50 in his pajama pocket while they were in the snack bar having something to eat (837).

Hall was subsequently released from the hospital and talked by telephone many, many times with petitioner who was in New York. In the first part of March, Sergeant Hensley of the Asheville Police Department, off duty, came into "Some Place Else" and told Jay the New York Authorities had pretty well sewed up the case and had recovered the gun that Jay killed Brenda with and it was an automatic (845). Hall immediately called petitioner and reported the conversation and again asked petitioner if he killed Brenda with an automatic or the .22 single shot which

he had earlier purchased for petitioner. According to Hall, petitioner insisted "I did it with the gun that you sold me" (845).

Hall then testified petitioner closed the conversation by predicting he would be indicted but not to worry because he had a very expensive lawyer and so he might not be calling anymore (845).

Norma S. Freeman (1014 *et seq.*) worked for Hall at Some Place Else. She saw petitioner take a gun out of a drawer in the pantry and put it in his coat. Moreover, she also saw petitioner at the club with Evelyn Rice.

Evelyn Rice testified (1165 *et seq.*) that she too saw the .22 in petitioner's hand and he told her he had just bought it for $80 from Hall. According to Evelyn Rice she went to the club on another occasion with petitioner in November 1968 and petitioner "started talking about his wife's sexual ability, and he told me that she was cold at this time" (1169). The following night, she was at Some Place Else again with petitioner and "He told me that a neighbor of his from New York and he were planning on bringing their wives down one New Year's Eve. After New Year's Eve, they were going to take their wives out for dinner. When they went out for dinner, they were going to take their wives up on Beaucatcher Mountain * * * They were going to have a car stashed by. They were going to shoot their wives. They were going to drive back to the Square, which is in the city part. They were going to change clothes on the way back to the Square. They were going to get out of the car, go to the police station, tell them that the wives had dropped them off and they were going to ride around. When the wives didn't pick them up at 11 o'clock they were going to have one of the guys at the Police Station drive them home * * * which would be Black Mountain, where his wife's parents live" (1170). "When they got

there they were going to say that the car wasn't there. They were going to go in and ask her parents, then they were going to report their wives missing" (1171).

Most significantly, the Rice woman testified petitioner "told me that he was paying a lot of alimony to his first wife and that he couldn't afford to pay another alimony" (1171).

The Murder

The record evidence proves beyond a reasonable doubt that petitioner pumped three .22 calibre bullets in the head of his wife as she slept the morning of December 27, 1968, with Illis Jurisson by his side. After the murder, petitioner and Jurisson left for work in New York City. To set the case in motion, Pobliner telephoned Adele Pober (269 *et seq.*) about 8:10 or 8:15 and asked her to check the house and to look for Brenda. The witness entered the Pobliner home through a back door, went up to the master bedroom where she saw the victim on the bed, covered with blood (270). Mrs. Pober immediately called the police and then telephoned her husband, Donald, who was still at home. Adele Pober insisted during the telephone conversation with her husband she did not tell him that Brenda was dead or covered with blood. Although Mrs. Pober had first reported to the authorities that the Pobliners were getting along well, she admitted this was false and, in fact, the petitioner and his wife were having severe matrimonial difficulties (283-292).

Donald Pober, the husband of the previous witness, testified he received a telephone call from his wife around 8:15 and immediately called the petitioner in his New York office and advised him to go home immediately because something was wrong with Brenda (294). According to Donald Pober, petitioner asked what was wrong and the

witness said he did not know (294). As a matter of fact, when Mrs. Pober returned home, she still did not tell her husband that Brenda had been shot or was dead. All she said was that "Brenda is gone" (299-300).

It is undisputed from the trial record that when Donald Pober left home for work, he did not know of the death of his neighbor. As a matter of fact, he testified that he did not learn what had happened until the afternoon of December 27, 1968, when he telephoned his wife from his place of business (295; 301-306; 309).

It is significant and relevant to the petitioner's guilt to examine closely what he said and did after receiving the early morning telephone call from Donald Pober. First of all, he called Mrs. Lilliane Scudder and reported to her in a normal tone of voice that he had been advised by a neighbor that his wife had been discovered bleeding at home, and had been taken to a hospital and that he would have to return immediately (668-669). Thereafter, he went to a Parking Garage where he spoke with three employees, Carl Bartelli, (313 *et seq.*), Lawrence Fleming (319 *et seq.*) and Robert Masucci (325 *et seq.*) to make arrangements to have someone drive him in his car to his home at Merrick. Both Bartelli and Fleming testified petitioner told him that his wife had been discovered at home "bleeding" (314; 320-321). Their testimony was corroborated by Masucci who actually drove petitioner to Merrick, the witness repeating that petitioner told him his wife was "bleeding" (326-330).

The Murder Scene

Patrolman Gerald Rummel (333 *et seq.*) was one of the first police officers to arrive at the scene. He found the deceased lying on her back on the bed in a pool of blood.

The petitioner arrived home and was met by Detective-Lieutenant Franklin Godsman (360 *et seq.*) who informed petitioner that his wife was dead. Detective Eugene Schoenberger (367 *et seq.*) remained with the petitioner at the scene informing him that the police did not know what had happened but that the child was alright.

Dr. Benjamin Beck (356 *et seq.*), Deputy County Medical Examiner, pronounced the deceased dead at the scene at about 10:00 A.M. after which Dr. Leslie Lukash, the Chief Medical Examiner, arrived and assumed all responsibilities for the examination. Detective-Sergeant James Short (477 *et seq.*) searched the house and determined the premises were closed and locked but the rear door was open. No signs of forcible entry were discovered.

Detective-Sergeant Raymond K. Schmiel checked for fingerprints. Inspector Glenn Carpenter (1121), a ballistics expert with the Scientific Investigation Bureau of the Nassau County Police Department, conducted a search at the scene and discovered small particles of powder and lead on the murder bed but no expended cartridges. At the request of Detective-Sergeant Bonora, petitioner voluntarily accompanied the police to the 7th Precinct Stationhouse, together with Detective Daniel Stark (463 *et seq.*), Homicide Squad. At the 7th Precinct Stationhouse, petitioner turned over to Sergeant Bonora a .22 calibre Derringer pistol, containing two live copper covered rounds and gave an exculpatory statement of his activities. The party then traveled from the 7th Precinct to Police Headquarters, Mineola, where petitioner voluntarily submitted himself to certain tests, namely paraffin, blood, clothing, shoes, the results of which were negative (397-399; 518-521; 526-528).

Following completion of the testing at Headquarters, petitioner, his father and the officers returned to the murder

scene where petitioner was advised of the necessity to search the premises and report any valuables that were missing. A search of the home was conducted and the circumstances were testified to by Detective-Captain Guido, Sergeant Bonora and Detective Henry Andreoli. In essence, these experienced police officers reported that the petitioner did not, in fact, conduct a search of his home. Rather, he walked through the premises giving a cursory look into each room, and reporting nothing was missing. In fact, petitioner did not once physically examine anything in the bedroom, notwithstanding the open jewelry boxes on the floor of the murder scene (401-402; 457-460; 463-475; 534-540).

Following the walk-through, petitioner and his father left the scene and were driven back to New York City by an officer.

In the meantime, Dr. Lukash, the Medical Examiner, had ordered the body of the deceased sent to the morgue where he performed an autopsy (1040 *et seq.*). It was the opinion of Dr. Lukash that the deceased was in a sleeping position when three bullets were fired into her head. It was the opinion of the Doctor that the competent producing cause of death was a massive hemorrhage, extensive lacerations and fragmentation of the skull, caused by one zinc covered cartridge and two copper jacketed bullets (1053-1058).

Dr. Lukash concluded the deceased had been dead when he viewed the body at the murder scene at 10:10 A.M. between six and eight hours (1066-1071). The Pathologist arrived at this conclusion by evaluating four principal tests which aid in the determination of the moment of death. The two key standards utilized were rigidity and lividity. The former usually takes eight hours and the

latter six. It was the opinion of the Medical Examiner that rigidity and lividity were complete (1061-1071).

The remainder of the Medical Examiner's testimony dealt with his removal of bullet fragments from the skull which he turned over to Inspector Carpenter, and the blood pattern and description of the type of bullet wounds (1046-1118).

Inspector Carpenter, the ballistics expert, examined the bullet fragments he received from Dr. Lukash, and concluded they had been fired from a weapon which had six groove riflings in its barrel (1127-1131).

The fatal shots could have been fired from a .22 calibre Colt frontier revolver (1150).

Inspector Carpenter also performed a series of tests at the murder scene to determine if various stains and splatters were blood, and to establish their direction and dimension. It was the opinion of Inspector Carpenter that the wounds observed on the deceased were not contact wounds due to the absence of powder burns or marks (1150).

The Police Investigation

The search for the killer of Brenda Pobliner continued until December 30, 1968, when the petitioner agreed to return to Police Headquarters, Mineola, the evening of December 31, 1968, for further questioning. Petitioner arrived with his companion, Illis Jurisson, and an off-duty New York City Police Officer (483-484; 541-542; 593).

Detective-Captain Guido briefly interviewed petitioner regarding his ownership of guns, the burglar alarm system at the house, after which petitioner was interviewed by Detective Andreoli who recorded an exculpatory statement of petitioner. The statement is People's Exhibit 43 (544-546; 1516).

Edward Gaines and Joe Hall

The police learned of Edward Gaines and Joe Hall at the very outset. In fact, Gaines testified he learned of the death of Brenda Pobliner and went to petitioner's home in the early evening. He testified he spoke to the petitioner over the telephone the following evening, and petitioner insisted he did not know what had happened (741). Pobliner advised Gaines that a neighbor had called him and told him to go home right away because Brenda was ill (741).

Detective-Sergeant Bonora testified he learned about Edward Gaines on the day of the murder because Gaines made inquiry at the Pobliner household (723-724).

Moreover, Detectives Andreoli and Schoenberger learned from their investigation that the maid who formerly worked for the Pobliners now was employed by Edward Gaines (692; 716; 720-722).

Sergeant Bonora and Detective Andreoli also learned of the existence of Joe Hall on the day of the crime from an addressbook belonging to the deceased found in the murder home (686-724). Furthermore, both officers learned from Inspector Costello that a local Merrick doctor reported the victim was concerned about a man by the name of Joe who was a friend of Jay Pobliner from Asheville, North Carolina. It was only natural that the focus of the investigation would shift to North Carolina. Sergeant Bonora and Detective Andreoli made the trip to Asheville during the week of January 6-January 13, 1969. According to the detectives, they reported to the Police Headquarters, Asheville, North Carolina, on January 10, 1969, where they first met Joe Hall who was waiting for them. The Nassau Officers spoke with Hall for about 30 minutes and found Hall to be reluctant. In fact, Hall advised the Nassau Authorities he would not give them any information (686-687; 711-712; 724-728).

Having run into a stone wall, the Nassau authorities applied to Judge Christ, Supreme Court, Appellate Division, Second Department, on January 15, and January 16, 1969, for two eavesdropping orders which authorized the interception and recording of certain telephone conversations on two telephones located in the apartment of the petitioner's parents, Mr. and Mrs. Herman Pobliner, New York City.

While the taps were in force and being monitored through the early part of February 1969, Detectives Andreoli and Bonora made a second trip to Asheville, North Carolina. Andreoli on the first trip to Asheville, became friendly with Lieutenant Wellborn of the Asheville Police Department. It was Lieutenant Wellborn who reported to Detective Andreoli that petitioner was expected in the Asheville area momentarily. These facts were confirmed by the parents of the victim who also resided in Asheville (566; 604-605; 693). In essence, the police officers testified that they saw petitioner in the Asheville area with a maid and his baby.

The real break in the case came when the Nassau Police received information from the Federal Bureau of Investigation, and also from Assistant Chief of Police Jarvis of the Asheville Police Department that Joe Hall wanted to talk to someone from Nassau County District Attorney's office (687; 714; 726-730). As a result of this information, Detectives Andreoli, and Bonora and Assistant District Attorney John Lewis left immediately for Asheville, North Carolina, to speak with Hall. The meeting took place March 24, 1969, at the Holiday Inn, Asheville, where Hall revealed for the first time that petitioner had killed his wife.

The Defense

Three witnesses were called by the defense, Dr. Herbert Leon Newbold (1238 *et seq.*) a North Carolina psychiatrist, Dr. Lawrence F. Weiner (1272 *et. seq.*), a Pathologist, and Illis Jurisson (1303 *et seq.*), petitioner's companion. Dr. Newbold examined Joe Hall a few times during the Spring of 1969 in connection with a matrimonial problem. Dr. Weiner, a Pathologst, testified as an expert and disputed the time of death fixed by the Medical Examiner, Dr. Lukash. In Dr. Weiner's opinion, Brenda Pobliner was shot to death between three to six hours before the examination by Dr. Lukash at the scene at 10:10. Admittedly, Dr. Weiner did not see the deceased or examine her or participate in the autopsy. If the jury believed Dr. Weiner, it was possible to find as a fact that Brenda Pobliner was alive when petitioner left for New York with his friend, Illis Jurisson.

The key defense witness was petitioner's old friend, Illis Jurisson. The witness testified he was at the petitioner's home the night of the murder because he expected to pick up a girlfriend who was to arrive at Kennedy Airport (1303 *et seq.*). According to the witness, petitioner and the deceased went to bed early but he remained up, watching television until about 1:20 in the morning. Jurisson slept in the guest room which was about 10 or 15 feet away from the bedroom of the petitioner and the deceased. According to Jurisson, he did not hear any noise or shots during the evening. He awoke early in the morning, washed and observed petitioner preparing the baby food, after which he and the petitioner walked the dog for about 10 minutes. They returned, put the dog in the garage, and drove to Manhattan where petitioner dropped off Jurisson at about 6:15 (1308).

Illis Jurisson testified he did not learn of the murder until the evening of December 27, 1968, when he called home. The following morning, he was questioned by the police for five hours and released. He was thereafter questioned the evening of December 31, 1968, for a second time and released.

On the direct examination, it was developed that Jurisson was hospitalized at the Gracie Square Hospital for five weeks for nerves where he received a series of shock treatments and was subsequently discharged. Jurisson insisted he did not see the petitoner shoot his wife, and he maintained he was not standing alongside of the petitioner when the shooting occurred (1312).

On cross examination, the witness was questioned about his hospitalization. Jurisson admitted he had been taken to the hospital by the petitioner and petitioner's attorney, Herbert Handman, where he was confined because of a mental breakdown. Jurisson conceded he had received a series of electro-shock treatments. Moreover, Jurisson admitted that the hospital bill in the amount of $900 had been paid for by petitioner's father (1319).

Jurisson was now on the payroll of petitioner's father for $150 a week (1324-1326).

Argument

POINT I

Pre-indictment wiretap does not mandate dismissal of indictment or reversal of judgment.

(In answer to petitioner's argument, Points I, II and III)

Petitioner insists (1) the judgment of conviction must be reversed, and (2) the indictment dismissed because at the investigation stage of the case, the police wiretapped certain conversations between Herbert Handman and petitioner.

Counsel has four main arguments: (1) as a matter of law, the judgment of conviction must be reversed and the indictment dismissed even if the trial was fair because the police intercepted privileged communications between petitioner and his attorney; (2) the trial judge did not conduct a formal hearing and require the District Attorney to prove the wiretap affidavit and order was proper; (3) the judge employed the wrong standard in deciding none of the trial evidence resulted from the wiretap; (4) the District Attorney used inadmissible wiretap evidence to cross examine Illis Jurisson. It is respectfully submitted petitioner was and is wrong on all counts.

A.

Cross Examination of Jurisson Proper.

The murder occurred the morning of December 27, 1968. The wiretap order was signed by the Hon. Marcus G. Christ, Appellate Division, Supreme Court, Second Department, for two phones at the Manhattan home of petitioner's parents. The taps ran from January 15, 1969, through February 2, 1969 (16; 112-116; 680-691; 710; 727). It must be conceded the District Attorney did not use actual wiretap evidence to convict petitioner. Moreover, we think it must also be conceded there is *no* evidence the wiretap was illegal or unlawful per se. The contention is petitioner did not get a fair trial because the District Attorney used wiretap evidence to cross examine Illis Jurisson about his hospitalization and shock treatments.

In the first place, there was no objection to the cross examination of Jurisson now complained of so the lawfulness of this stage of the case was not reviewable (§ 470.05 (2) CPL; see, e.g. *People* v. *McCormick* [1972] 31 N.Y. 2d 807; *People* v. *Berrios* [1971] 28 N.Y. 2d 361; *People* v. *Reynolds* [1969] 25 N.Y. 2d 489; *People* v. *Gates* [1969] 24 N.Y. 2d 666; *People* v. *De Renzzio* [1966] 19 N.Y. 2d 45; *People* v. *McQueen* [1966] 18 N.Y. 2d 337; *People* v. *Friola* [1962] 11 N.Y. 2d 157).

Moreover, the evidence of the hospitalization of Jurisson was developed first by the defense on the direct examination of Jurisson (1311). Under the circumstances of this case, even if the police eavesdropped illegally, the cross examination would have been proper (*People* v. *Mendez* [1971] 28 N.Y. 2d 94; *People* v. *Morhouse* [1967] 21 N.Y. 2d 66; *People* v. *Scharfstein* [Sup. Ct., Queens Co. 1967] 52 Misc. 2d 976 [Shapiro, J.]). The Court of Appeals has consistently ruled evidence is competent if the police come by the proof independent of the unlawful wiretap (*People* v. *Mendez, supra; People* v. *Morhouse, supra*).

B.

Petitioner Waived Right to Formal Hearing.

It is conceded by the respondent that petitioner had a right to a hearing to challenge the legality of the wiretap (§ 710.10-710.70 CPL; *People* v. *McCall* [1966] 17 N.Y. 2d 152). Moreover, as we read the record, a timely motion was made by Maurice Edelbaum and a hearing was ordered by Judge Kelly (10-12). When the case was called for trial on January 21, 1970, Assistant District Attorney John Lewis advised Judge Kelly and Maurice Edelbaum (1) he did not intend to use wiretap evidence; and (2) he did not propose to introduce evidence developed from the eavesdrop (110-116). It was agreed between Judge Kelly, Maurice Edelbaum and Assistant District Attorney Lewis that Edelbaum would be given all the tapes and a copy or transcript prepared by the police.

It was further agreed between the parties that Mr. Edelbaum could listen to all of the tapes with a copy of the transcript prepared by the police in court facilities to be made available by Judge Kelly. The start of the trial was adjourned until Mr. Edelbaum completed his undertaking.

The official County Court records reveal that Mr. Edelbaum and petitioner went about their business on January 21, 22, 26, 28, 29, February 2 and 3, 1970. On February 4, 1970, the defense signaled they were finished and again moved to suppress all wiretap evidence for the sole reason the police recorded certain conversations between petitioner and Handman (113-119; 221-222). The Trial District Attorney consented to a hearing even though he again represented to Judge Kelly and Mr. Edelbaum that he did not propose to use wiretap or eavesdrop evidence (118).

Judge Kelly believed a pre-trial hearing was unnecessary. He ruled a hearing could be held during the trial if Mr. Edelbaum suspected a particular item of evidence offered by the District Attorney resulted directly from the wiretap. The ruling of Judge Kelly was consistent with the rationale of *People* v. *Ganci* (27 N.Y. 2d 418) where this court recommended when possible, a single trial of all the issues rather than multiple proceedings separately deciding Fourth, Fifth, Sixth and Fourteenth Amendment issues, separate from the issue of petitioner's guilt.

For reasons not relevant to this petition the first trial terminated almost immediately in a mistrial and the case went over until September 1970 with consent of the defense.

On September 14, 1970, when the case was ready for trial a second time, the District Attorney urged Judge Kelly to reconsider and to hold a pre-trial hearing to clear up the wiretap issue before the trial actually commenced (249-251). Mr. Edelbaum strenuously *objected* insisting that Judge Kelly's original determination to hold a hearing during the trial, if necessary, was adequate and fair (253).

Judge Kelly stuck with his initial determination and the trial commenced (249-256).

During the trial, Mr. Edelbaum challenged two witnesses, Joe Hall and Ed Gaines, but no other proof. Judge Kelly interrupted the trial, excused the jury, and ordered the District Attorney to "convince the court" (683) the police learned about Hall and Gaines from sources independent of the wiretap. In essence, Detectives Henry Andreoli (685 *et seq.*), Eugene Schoenberger (716 *et seq.*) and Mathew Bonora (723 *et seq.*) testified they learned about Ed Gaines because he came to the murder scene the day of the homicide and made inquiry. Further, that they would have discovered Gaines in any event because Pobliner's former maid worked for Gaines at the time of the killing.

The police learned about Joe Hall also on the day of the murder from an addressbook discovered at the scene which belonged to the deceased. Further, a local doctor reported to the police that the deceased was suspicious of a "Joe" from Asheville, North Carolina.

Judge Kelly ruled (732):

> "The People had proven by clear and convincing proof that information concerning two witnesses in question, Hall and Gaines, was obtained by the police in a legal manner outside of any wiretap evidence, and they will, therefore, be permitted to testify."

It is respectfully submitted even if the police learned about Hall and Gaines from the eavesdrop, the result would be the same because the wiretap per se was not illegal or unlawful. The defense have never offered a single item of evidence proving or tending to prove that Judge Christ acted improperly. The court has decided: "we have made it clear that where a defendant challenges the admissibility of physical evidence or makes a motion to suppress, he bears the ultimate burden of proving that the evidence should not be used against him" (*People* v. *Berrios* [1971] 28 N.Y. 2d 361, p. 367; see, e.g. *People* v. *Baldwin* [1969] 25 N.Y. 2d

66, p. 70; *People* v. *Whitehurst* [1969] 25 N.Y. 2d 389, p. 391; *People* v. *Alfinito* [1965] 16 N.Y. 2d 181; *People* v. *Malinsky* [1965] 15 N.Y. 2d 86).

Admittedly "the burden of going forward to show the legality of the police conduct in the first instance" may be on the District Attorney, but the "ultimate burden of proving that the evidence should not be used against him" is on the accused (*People* v. *Berrios, supra;* see, e.g. *Alderman* v. *United States* [1969] 394 U.S. 165; 813-a Code Crim. Pro. § 710.60 CPL).

The record proves clearly and convincingly that: (1) the District Attorney sustained his burden; and (2) petitioner did not.

In fact, as we read the record, the defense offered *no* proof the eavesdrop was illegal or unlawful per se. A legal argument was made that wiretap evidence and every lead developed therefrom must be suppressed because, and solely because, lawyer-client talk between Handman and petitioner was intercepted. It is respectfully submitted the general rule is the other way. Proof that the police erred in recording the talk between Handman and petitioner is not conclusive evidence they acted improperly when they recorded conversations between Handman and petitioner's parents, or Hyman Rosenblatt, the investigator. Even if Judge Kelly believed the police made a mistake, the penalty is the loss of the conversations recorded improperly and nothing more (*People* v. *Mendez* [1971] 28 N.Y. 2d 94, pp. 96-101; *People* v. *Morhouse* [1967] 21 N.Y. 2d 66; *Wong Sun* v. *United States* [1963] 371 U.S. 471; *Nardone* v. *United States* [1939] 308 U.S. 338; *Silverthorn Lumber Co.* v. *United States* [1920] 251 U.S. 385).

Petitioner also argued Judge Kelly employed the wrong test or standard to determine the police discovered Joe Hall and Ed Gaines independently of the eavesdrop. It is respectfully submitted the procedures adopted by Judge

Kelly went far beyond the minimum requirements of the law (*People* v. *Berrios, supra*). Judge Kelly cast the complete burden on the District Attorney, i.e. the burden of going forward and the burden of "ultimate persuasion." Furthermore, Judge Kelly required proof beyond a reasonable doubt from the District Attorney on both points. This conclusion is apparent because Judge Kelly ruled, "The People had proven by clear and convincing" evidence that Hall and Gaines were discovered the day of the crime and not because of the wiretap. In Nassau County "clear and convincing" means beyond a reasonable doubt (*People* v. *Ballot* [1967] 20 N.Y. 2d 600, p. 606; *United States* v. *Wade* [1967] 388 U.S. 218, p. 240). The District Attorney assumed an overall position relative to the wiretap at the outset much more favorable to the petitioner than he was entitled to under the law. Moreover, the trial judge placed the full and complete burden on the District Attorney at the hearing, a decision also more favorable to the accused than required by the law.

Under the circumstances of this case, the rulings of Judge Kelly regarding the hearing and the proper test or standard were not prejudicial to petitioner.

C.

Conversations between Handman and Petitioner About Jurisson Not Privileged.

The privileged quality of some communications between attorney and client may be routed in Roman law (8 Wigmore on Evidence, 2d Ed., § 2290; Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Cal. L. Rev. 487 [1928] but in New York today the rights of the parties are strictly statutory (§ 4503 CPLR: § 700.20, subd. 2(c) CPL: § 710.10, § 710.20 CPL; 18 U.S.C. 2517, subd. 4).

Section 4503, CPLR, outlaws evidence of a "confidential communication made between the attorney or his employee

and the client in the course of professional employment." Moreover, "evidence of any such communications * * * shall not be disclosed by any state, municipal or local governmental agency * * *."

Section 700.20, subd. 2(c), Criminal Procedure Law, requires a statement in the application for an eavesdropping warrant: "that such communications are not otherwise legally privileged" and §§ 700.10 and 700.20, Criminal Procedure Law, provide for a motion to suppress if privileged communications have been intercepted under illegal circumstances.

Furthermore, the Safe Streets Act expressly declares: "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose this privileged character." (18 U.S.C. 2517, subd. 4.)

It is admitted that all communication between attorney and client are not incompetent. It is only those exchanges that are "confidential" (§ 4503, CPLR; *Whiting* v. *Barney* [1864] 30 N.Y. 330, p. 332) that must be kept secret. What is "confidential" is not always easy to determine. "The rule deductible from the authorities is, that all communications made by a client to his counsel, for the purposes of professional advice or assistance, are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter *proper* for such advice or aid * * *" (*Britton* v. *Lorenz* [1871] 45 N.Y. 51, p. 57 (italics mine); *Bacon* v. *Frizbee* [1880] 80 N.Y. 394, p. 398; *People* v. *Buchanan* [1895] 145 N.Y. 1, p. 27).

Depending upon the facts differences may arise whether in a given case the communications were intended to be "confidential" but there is no difference of opinion that the privilege does not exist if the communications are in contemplation of a criminal or fraudulent act (*Clark* v.

United States [1932] 289 U.S. 1, pp. 15-16; *Alexander* v. *United States* [1891] 138 U.S. 353; *People* v. *Farmer* [1909] 194 N.Y. 251; *United States* v. *Bob* [2d Cir. 1939] 106 F. 2d 37; *People ex rel. Vogelstein* v. *Warden* [Sup. Ct. N.Y. County 1934] 150 Misc. 714, aff'd 242 App. Div. 611; 8 Wigmore on Evidence, 3d Ed. §§ 2298-2299; McCormick on Evidence, 2d Ed., § 95, 3 Wharton's Criminal Evidence, 13th Ed. 558). Wigmore says: "upon this much there has been a fair consensus among all who have declared themselves the subject" (p. 575) * * * "that the privilege cannot avail to protect the client in concerting with the attorney a *crime* or other evil enterprise; and for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client" (p. 575). "* * * where the desired advice refers not to *prior wrongdoing*, but to *future wrongdoing*" (p. 574), there can be no privilege.

The privilege cannot be brushed aside by merely pleading or charging that a fraud or crime is contemplated. There must be a showing of a prima facie case sufficient to satisfy the judge that light should be let in (*Clark* v. *United States, supra; United States* v. *Bob, supra; Pollack* v. *United States* [5th Cir. 1953] 202 F. 2d 281, cert. den. 345 U.S. 993). Where evidence has been introduced giving "color" to the charge, the privilege must be blown away (*supra; People* v. *Cooper* [1954] 307 N.Y. 253; *United States* v. *Weinberg* [3d Cir. 1955] 226 F. 2d 161; In Re *Selser* [1954] 15 N.J. 393, 105 A. 2d 395; *Soyar* v. *Stanley* [1941] 241 Ala. 39, 1 S. 2d 21; *United States* v. *Summe* [E.D. Ky. 1962] 208 F. Supp. 925).

The decision of Judge Shientag in *People ex rel. Vogelstein* v. *Warden* (*supra*) is frequently cited as authority for the proposition in New York that "there must be 'something to give color to the charge' " (p. 721) otherwise the privilege controls. The facts before Judge Shientag

were most interesting. Harry Vogelstein, the relator, appeared in the old Magistrate's Court and the Court of Special Sessions in the City of New York as counsel representing fifteen defendants charged with lottery violations. Eleven of the fifteen gambling defendants testified before the Grand Jury that they did not hire Vogelstein, did not pay him, and did not know him. The Grand Jury were investigating organized gambling in New York so they subpoenaed Harry Vogelstein to find out the identity of "Mr. Big." Vogelstein refused to identify who retained him to represent the runners claiming privilege between himself and the suspect. He was held in contempt and sued out a writ of habeas corpus. Judge Shientag concluded: "What has taken place here, as indicated by the testimony given before the Grand Jury on which the commitment was based, certainly lends color to the charge that the relator was retained in furtherance of an unlawful scheme for wholesale violations of the law. * * * The privilege vanishes when the relation giving rise to it is abused by the client" (p. 721).

The evidence of "color" in *Vogelstein* is dwarfed by the proof attending Handman's relations with petitioner from the outset of the murder investigation. In the first place, the police did not buy the theory of petitioner that Brenda Pobliner had been killed by a burglar because in Nassau County even burglars go to bed by 5 or 6 in the morning, and there was no forced entry into the premises. Secondly, the police dog that was ready and willing to eat the Homicide detectives the morning of the murder did not sound an alarm earlier. Third, the presence of Illis Jurisson without reasonable explanation smacked of an alibi. Fourth, the eyeball to eyeball interview of petitioner reeked with suspicion. Fifth, the personal appearance of Illis Jurisson at the initial interview suggested Jurisson was on the verge of a nervous breakdown.

The prime suspect from the outset was petitioner. In this judgment, the police and District Attorney were correct. Moreover, the initial determination was Jurisson had been sucked into the murder as an alibi witness. It was the judgment of the police and the District Attorney that Illis Jurisson was the real key to the murder. If Jurisson could be persuaded to testify truthfully before the Grand Jury, the true murderer would be identified.

It is undisputed Illis Jurisson did have a nervous breakdown at his place of employment. Moreover, petitioner and Handman took him to the Gracie Square Hospital where Jurisson received a series of shock treatments. Further, the hospital bill for $900 was paid for by petitioner's parents who at the time of the trial had Jurisson on the payroll for $150 per week because Jurisson was unable to find suitable employment.

Petitioner contends the police had no right to eavesdrop on his conversations with Handman because they were privileged. This District Attorney maintains the police, under the circumstances of this case, would have had to be deaf, dumb and blind to shut off the recorder and look the other way while petitioner and Handman shuffled Jurisson off to the hospital and a string of shock treatments. It was apparent that a medical barrier had been erected by petitioner, his family and Handman between Jurisson and the police, District Attorney and Grand Jury. For example, petitioner argued that when Handman called up petitioner's father to report that the doctor at the hospital told him Illis was asleep, the machine should have been turned off. The reason has nothing to do with counseling petitioner. The parties are disturbed because Handman got caught assuring petitioner's father "the problem is over for a while" (A-587). What "problem is over for a while"? The answer to this question is obvious: The danger that Illis Jurisson would speak the truth to the police and the Grand Jury.

The police judgment in this matter was 100% correct. Petitioner subsequently bragged to Hall that he shot Brenda with Illis looking on. He also bragged that Illis was a good actor but we know that he wasn't so good that the Pobliner family didn't worry that Illis would not fool the police. This is why petitioner and Handman persisted in their efforts to hospitalize Jurisson. When Roosevelt Hospital refused to take Jurisson, the conspirators did not give up. They placed "the actor" in Gracie Square.

The affidavit of Jurisson submitted in support of the motion for a new trial is most enlightening. In it Jurisson admits that the shock treatments were "such that they lock out a great deal of any recollection that the mind had, and during the course of this time I had almost no recollection whatsoever of any events that had transpired prior thereto, and I know I have no recollection of what transpired in the hospital except for what has been told to me since that time. I have learned further that after a series of shock treatments and the care that I underwent, one's mind slowly recollects past events" (p. 27). We would add it is common knowledge, not all "past events," only some.

It is respectfully submitted the hospitalization of Jurisson by petitioner, his father and Handman was not privileged information because it was completely foreign to and totally unconnected with petitioner's *lawful* rights, privileges, interests and immunities growing out of the murder of his wife.

Certainly if Jurisson had been killed by petitioner to insure that he did not testify, conversations between petitioner and Handman would be admissible at the trial of either or both for the murder of Jurisson (*Cole* v. *State* [1931] 50 Okla. Cr. Rptr. 399, 298 P. 892.) The same rule would apply if the parties intended to "whip" Jurisson (*Jackson* v. *State* [1927] 155 Tenn. 371, 293 S.W.

539) or "bribe" him (*United States* v. *Kahn* [2d Cir. 1966] 366 F. 2d 259).

Persuasive if not controlling were the comments of the Circuit Court of Appeals in the case of Frances Kahn who with her secretary-investigator, Israel Schwartzberg and Vincent Pacelli, were indicted for Conspiracy to bribe Charlie Hedges, a government witness against Pacelli. Hedges was serving a prison sentence when he agreed to let the government place a bug in his cell. Frances Kahn visited Hedges and offered him substantial sums of money if he would not testify. It was clear Frances Kahn could not successfully convince the Circuit Court of Appeals that her conversations and bribe offer with Hedges were privileged.

Certainly, if Handman had anything to do with disposing of the gun neither he nor petitioner could claim privilege (In Re *Ryder* [4th Cir. 1967] 387 F. 2d 713). It is equally well established petitioner has no privilege when petitioner spoke to Rosenblatt, an investigator hired by his father. Moreover the privilege would certainly not apply to telephone conversations intercepted between Rosenblatt, the investigator, and petitioner's parents, or Handman and petitioner's parents. For the convenience of the court, we have attached as appendices C, D, E and F a synopsis of the taped conversations between (a) petitioner and Handman; (b) petitioner and Herman Rosenblatt, the investigator; (c) the attorneys and petitioner's parents; and (d) Rosenblatt, the investigator, and petitioner's parents.

Petitioner and Handman.

We have already discussed the rights of the parties in this instance. It is the argument of the District Attorney that petitioner's behavior towards Illis Jurisson was not privileged. Therefore, it was not "confidential" within the meaning of § 4503 CPLR.

Petitioner and Hyman Rosenblatt

The statute protects "a confidential communication made between the attorney or his employee and the client" (§ 4503 CPLR) but not conversations between the attorney or client and somebody else's employee (see, *e.g. Matter of Putnam* [N.Y Co. 1929] 135 Misc. 311, aff'd 257 N.Y. 140; Anno:—Attorney-Client Privilege-Extent (96 ALR 2d 125). Hyman Rosenblatt was not retained by Handman or Maurice Edelbaum and he didn't work for them alone. Moreover, the evidence is clear and convincing that Rosenblatt was hired or employed by petitioner's father and paid for by petitioner's father (33-39, 42). In fact, petitioner's father apparently paid everybody. According to Jurisson, he believed he, too, was represented by Handman and that Handman's fee would be paid for by petitioner's father just as petitioner's father paid the bail bondsman to get Jurisson out of jail as a material witness. It is doubtful, at best, that conversations between petitioner's and his father's investigator, or Handman and the investigator are privileged (*supra;* 3 Wharton's Criminal Evidence, 13th Ed., § 559; McCormick on Evidence, 2d Ed., §§ 91, 96; Anno:—Witness-Confidential Clerk-Privilege, 96 ALR 2d 159) but it is not doubtful at all about the remaining two situations.

Petitioner's Parents Talking to the Attorneys or the Investigator

It is apparent that § 4503 does not apply to telephone conversations between Rosenblatt, the investigator, and Mr. and Mrs. Pobliner because under the circumstances of this case the statute would not apply to the parties (*Jackson* v. *French* [1829] 3 Wend. 337). Companions, friends or relatives of the client have never been included within the privilege (*supra*).

Waiver

It is also obvious from the conversations challenged between petitioner, Handman, Mr. and Mrs. Pobliner and Hyman Rosenblatt that absolutely no conversations between petitioner and Handman were really intended to be secret or kept confidential from petitioner's mother and father (see, *e.g. People* v. *Shapiro* [1955] 308 N.Y. 453; *People* v. *Farmer* [1909] 194 N.Y. 251; *People* v. *Patrick* [1905] 182 N.Y. 131). The privilege to waive was petitioner's and it is clear from the round robin conversations about Illis, the maid, Effie Mae, th' activities of the Nassau County Police Department, etc. that petitioner determined to keep his parents completely informed. The true nature of the relationship between petitioner and his father in particular, can be determined best by reading all the transcripts of the telephone conversations. It is respectfully submitted if there were any secrets between petitioner and Handman withheld from Mr. Pobliner, it is certainly not the recorded conversations challenged by this petition. The judgment of the petitioner to keep his mother and father informed was reasonable and logical because it was petitioner's father who put up the money for the defense in this case.

No Wiretap Evidence

The most important reason why the court should discount petitioner's wiretap argument is because: (1) there was *no* wiretap evidence introduced at the trial; and (2) there was *not* a single item of evidence received that emanated or flowed directly from any wiretap. Even if the police acted improperly, the judgment must be upheld because the trial was fair (see, *e.g. Roberts* v. *United States* [1967] 389 U.S. 18; *Burger* v. *United States* [1967] 388 U.S. 41; *O'Brien* v. *United States* [1967] 386 U.S. 345; *Osborn* v. *United States* [1966] 385 U.S. 323; *Hoffa*

v. *United States* [1966] 385 U.S. 293; *Black* v. *United States* [1966] 385 U.S. 26).

Many are the defendants who have argued in vain the indictment must be dismissed because the police eavesdropped unlawfully (*People* v. *Mendez* [1971] 28 N.Y. 2d 94; *People* v. *Morhouse* [1967] 21 N.Y. 2d 66; *People* v. *Scharfstein* [Sup. Ct. Queens County 1967] 52 Misc. 2d 976 [Shapiro, J.]; *Taglianelli* v. *United States* [1st Cir. 1968] 398 F. 2d 558, aff'd 392 U.S. 316; *United States* v. *Kahn* [2d Cir. 1966] 367 F. 2d 259; *United States* v. *Tave* [2d Cir. 1963] 329 F. 2d 848; *Caldwell* v. *United States* [D.C. 1953] 205 F. 2d 879; *United States* v. *Coplan* [D.C. 1951] 191 F. 2d 749).

The main thrust of the argument in behalf of L. Judson Morhouse was for a dismissal of the indictment because of an illegal bug. This court concluded Morhouse received a fair trial because none of the evidence of his guilt resulted from the unlawful police eavesdrop. This court did not reverse and it did not dismiss the indictment because of the earlier bad bug.

Frances Kahn made exactly the same argument to the Circuit Court of Appeals (366 F. 2d 259). Miss Kahn contended the judgment of conviction had to be reversed and the indictment dismissed because the police acted illegally even if the trial was fair. The Circuit Court of Appeals concluded the judgment of conviction had to be sustained even if the bug was unconstitutional because the government offered no eavesdrop evidence of Miss Kahn's guilt or proof resulting therefrom.

The Motion to Reargue in the State Court of Appeals

In behalf of the motion petitioner's brief asserted (p. 3):

> "It is submitted that appellant's argument was misapprehended and that by requiring a showing of 'prejudice' in the traditional sense, i.e. an actual use at trial, this court overlooked a clear line of authorities including its own prior decisions. Moreover, the court failed to accord due consideration to clear record evidence of how the prosecution, both before and during trial, exploited its 'grossly improper' interception of attorney-client conversations."

The respondent contended: (1) the Court did not overlook a clear line of authority in New York or elsewhere requiring a reversal and a dismissal of the indictment or a further hearing absent evidence of prejudice; (2) the court did not ignore clear record evidence that the District Attorney exploited confidential communications between Herbert Handman and Jay Pobliner because such evidence or proof does not exist.

Specifically, respondent asserted, the United States Circuit Court of Appeals, Second Circuit, recently ordered a hearing in a major narcotics prosecution based largely on wiretap evidence. Specifically, the Circuit Court of Appeals ordered the hearing to determine if the legal wiretap was kept to a minimum as required by the Safe Streets Act, 18 U.S.C. § 2518, subd. (5). It was admitted the government tapped numerous telephone calls involving an attorney and at least one of the conspirators (13 Cr. L. 2083).

Judge Pollack conducted the hearing and concluded there had been no intereference with the attorney-client relationship. The District Court Judge wrote (13 Cr. L. 2273, p. 2275):

> "A call from a lawyer is not automatically privileged. It is not a privileged communication to discuss with a lawyer matters relating to criminal

> activity. The privilege exists where the purpose of the communication is to obtain professional legal advice and not news of others, or gossip, or criminality. An examination of representative calls from attorneys does not reveal that any of the intercepted calls were arguably privileged. None of these were used at trial."

The June 6, 1973, decision of Judge Pollack in *United States* v. *Bynum* (13 Cr. L. 2275) was consistent with the rationale of Pobliner and all the Supreme Court cases previously cited by respondent and the Court of Appeals in its decision (*O'Brien* v. *United States* [1967] 386 U.S. 345; *Black* v. *United States* [1966] 385 U.S. 26; *Hoffa* v. *United States* [1966] 385 U.S. 293).

Counsel's main thrust for reversal was and continues to be the simple fact that Handman was intercepted talking to Jay Pobliner. The Court of Appeals in its decision concluded:

> "Much of the recorded conversations were concerned with the progress of police investigations, defendant's plans for investigation, or very simply to arrange conferences among Jay, his lawyers, and investigator, there were discussions of possible witnesses, including Jurisson, and of Jay's plan to visit Asheville, North Carolina.
>
> Some conversation between Jay and his lawyer friend involved treatment of Jurisson's mental condition. The District Attorney asserts that by getting Jurisson admitted to a private hospital for shock treatments, Jay and his lawyer were intentionally destroying material evidence. The District Attorney therefor argues that the conversations involved commission of a crime which would not be covered by any confidential privilege. The conversa-

> tions between Jay and his lawyer show that they arranged for Jurisson's admission to the hospital; that they fretted about what Jurisson might say to the police; and that Jay's family paid a Jurisson hospital bill of $900."

The Trial Judge, five Appellate Division Justices and the Court of Appeals of New York unanimously found, as a fact, not a single conversation which truly dealt with the lawful secrets of the defense was exploited by the District Attorney. The general rule everywhere is "The privilege exists where the purpose of the communication is to obtain professional legal advice and not news of others, or gossip, or criminality" (*United States* v. *Bynum, supra*) as in this case.

Counsel insisted "It is not appellant's argument, as stated in the opinion, that the mere interception of attorney-client conversations alone is sufficient to justify dismissing the indictment". Respondent read petitioner's brief in this vein; presumably the Appellate Division did too, and so did all seven Judges of the Court of Appeals. Counsel asserted he actually "contends that at a time when he was a target, the interception of constitutionally protected attorney-client conversations *concerning defense preparation for and strategy relating to this very prosecution* justifies the relief requested" (supra). (Italics ours.)

Counsel's proposed test is not the rule anywhere. The Court of Appeals properly concluded:

> "It must be shown that the interception undermined the right to counsel and that the interference could not be cured by holding a new trial. In other words, it must appear to warrant a dismissal, as distinguished from the limited sanction of exclusion of evidence, *that the prosecution could or would necessarily avail itself of the illegal evidence directly or*

indirectly by way of strategy or tactics, which it could not have but for the unlawful wiretap" (italics mine).

Counsel insisted the "prior decisions of this court and those of other jurisdictions have been explicit in rejecting as a predicate to relief a showing of 'prejudice' where the attorney-client relationship was invaded by the prosecution as in the case at bar". It is most respectfully submitted the argument (supra) is not persuasive. Though counsel insisted he did not urge a reversal solely because Handman was intercepted and recorded talking to Jay Pobliner, the effect of the argument made is identical. Counsel insisted the controlling law does not require a showing of prejudice. Right reason, common sense and precedent is to the contrary. Every defendant is entitled to a fair trial, not a perfect investigation. Here, the People stipulated: (1) there would be no wiretap evidence introduced at the trial; (2) no evidence derived from wiretap would be offered.

Moreover, the People were prepared to prove and did prove at every step of the way that each item of evidence tendered before the judge and jury was developed separately from the wiretap, except the cross-examination of Illis Jurisson dealing with his hospitalization and electroshock treatments. The reason the People did not prove the manner in which the police learned about the hospitalization of Jurisson, the eyewitness to the murder, and the electroshock treatments is because Mr. Edelbaum did not object. Undoubtedly, an attorney with the experience of Mr. Edelbaum knew from his own investigation that the police, independently of the wiretap, learned of the hospitalization of Jurisson.

Counsel insisted re-argument should be granted for two reasons: (1) the court improperly required a showing of prejudice and found none; (2) the record was replete with

proof the District Attorney exploited the interception of privileged communications. It is respectfully submitted petitioner was wrong on both counts.

Counsel insisted he did not intend to argue for a reversal and a dismissal absent prejudice, and to prove his point he contended the court "overlooked a clear line of authorities, including its own prior decisions" which stand for the proposition prejudice need not be established in such case. Whatever the real intentions of former counsel were, the rights of the parties are clear. It is wrong to eavesdrop on privileged communications between attorney and client but not so evil that a reversal is required, absent proof of prejudice.

Counsel was in plain error when he suggested *People* v. *Morhouse* (21 N.Y. 2d 66) stands for a reversal absent prejudice. Moreover, the controlling authority elsewhere is consistent with the general rule reaffirmed by the court in its principal decision.

The State of Washington (62 Wn. 2d 371) was forced to adopt a different rule because the local authorities conspired to violate the Sixth Amendment right to counsel of all prisoners in a local jail. Absent proof of good faith and probable cause, the deliberate compromise of all the Sixth Amendment rights of every prisoner in the Washington Jail required the extreme remedy of dismissal to force the local authorities to comply with the spirit of the right to counsel. Otherwise, the rule everywhere requires a showing of prejudice no matter what counsel argued on the appeal or now.

Counsel was also in error for suggesting the record proves prejudice. The trial record consisted of three volumes, totaling over 950 pages. A supplemental record was printed, served and filed by petitioner's counsel consisting of five volumes of transcripts of all the wiretaps in the case, which ran to more than 1,500 pages. Other than a footnote

on page 5 of the re-argument brief, there was no real effort to prove which conversation was truly privileged, and in what way petitioner was prejudiced by the improper use of the privileged communications. On the other hand, the District Attorney stood ready at all times to prove each piece of evidence was developed separately from the wiretap.

To overcome the absence of objection to the cross-examination of Jurisson, counsel argued, " 'no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right' ". This is not the law (§ 470.05, subd. 2, CPL; see, e.g. *People* v. *McCormick* [1972] 31 N.Y. 2d 807; *People* v. *Berrios* [1971] 28 N.Y. 2d 361; *People* v. *Reynolds* [1969] 25 N.Y. 2d 489; *People* v. *Gates* [1969] 24 N.Y. 2d 666; *People* v. *De Renzzio* [1966] 19 N.Y. 2d 45; *People* v. *McQueen* [1966] 18 N.Y. 2d 337; *People* v. *Friola* [1962] 11 N.Y. 2d 157) and it certainly was not grounds for a re-argument.

Equally specious was the suggestion that Maurice Edelbaum didn't knowingly and intelligently waive his right to object to the cross-examination of Jurisson relative to his hospitalization by petitioner and Handman. In the first place, Edelbaum opened up this area on the direct examination of Jurisson. Moreover, the record proves clearly and convincingly (1) Edelbaum was offered a pre-trial wiretap hearing which he turned down; (2) Edelbaum deliberately reserved for the actual trial his right to object to any item of evidence if in his judgment the evidence was illegal; (3) Edelbaum did, indeed, object throughout the trial to different proof; (4) Edelbaum is a skilled practitioner, not a neophyte, who has practiced criminal law in New York for decades. It all adds up to a legitimate waiver.

Further, it is not the law in New York or elsewhere that a judgment of conviction be reversed and an indictment dismissed absent prejudice.

Counsel also insisted "The trial court denied appellant's timely motion for a full hearing on the legality of and possible taint from the wiretaps on the representation by the District Attorney that no leads or other evidence were obtained from the tapes".

The issue of the hearing was fully briefed and considered in detail in the published report of the Court of Appeals. The proven facts are the District Attorney insisted that a hearing be held, whereas Maurice Edelbaum, defense counsel, was opposed to a pretrial hearing.

Counsel also argued *People* v. *Munger* [1969], 24 N.Y. 2d 445, dictated that there be a re-argument (supra). Unlike the defendant in *Munger*, the record in this case clearly and unequivocally establishes that Edelbaum was offered a hearing and refused. The trial judge did not deny a request by Edelbaum for a hearing on the representation of the District Attorney alone that he had no wiretap evidence or leads derived therefrom.

Counsel also argued that his motion for a new trial should have been granted because the District Attorney suppressed material and exculpatory evidence. Counsel insisted that he did not make a motion on the grounds of newly discovered evidence. It is clear that the decision of the court did not turn on the name or identity of the motion. The court went to the merits. The rights of the parties were fully considered and briefed by the respondent.

Conclusory Comment

It is respectfully submitted petitioner was lawfully tried and fairly convicted. It is apparent he was represented at the trial by an able and experienced attorney. Moreover, it is also apparent petitioner was represented by an equally competent appellate counsel. As Judge Breitel (now Chief Judge) of the Court of Appeals stated in the published opinion of the Court of Appeals:

"There should be an affirmance. Although the interception of the lawyer-client telephone conversations was grossly improper, the counsels of the defense were not so invaded that the indictment should be dismissed. On the related issue whether improperly obtained wiretap evidence was used indirectly by the prosecution, the court properly found that there was no such use. In that connection, defendant either had a hearing during trial or waived his right to a hearing, in seeking to establish such indirect use. The remaining issues raised do not reveal error in the trial."

POINT II

Lilliane Scudder properly granted immunity.

(In answer to petitioner's Argument, Point IV)

The deceased was killed about two days after petitioner gave Lilliane Scudder a watch.

Lilliane Scudder essentially testified (1) to 10 to 12 acts of sexual intercourse with petitioner during the Fall and early winter of 1968; (2) petitioner introduced her to his son by his first marriage; (3) petitioner also introduced her at his place of employment; (4) petitioner gave Lilliane Scudder a ring for her birthday and a watch for Christmas; (5) petitioner phoned Lilliane Scudder (after receiving the signal from Donald Pober) before petitioner went home to the murder scene.

Petitioner insists there was no statutory authority to give Lilliane Scudder immunity from prosecution for adultery based upon her incriminating testimony so the murder judgment must be reversed. It is apparent Lilliane Scudder and petitioner could have been charged with the crime of Conspiracy to commit Adultery (§ 105.00, Penal Law) and Adultery (255.17, Penal Law). Moreover, it has been for a very long time the statutory law of New

York that immunity may be conferred where evidence reveals a conspiracy (§ 584, former Penal Law). With the adoption of the new Criminal Procedure Law, it is now settled immunity may be granted *in any case* outside the Grand Jury by the court when requested by the District Attorney (§ 50.30, Criminal Procedure Law). It is respectfully submitted the treatment of the Scudder woman as a witness was not prejudicial to the petitioner.

Moreover, absent a statute there is no constitutional impediment or prohibition against a voluntary agreement between the witness and her lawyer on the one hand and a trial judge and the District Attorney not to prosecute if the witness testifies truthfully. The statutes in such case were designed for a reluctant witness, not one who voluntarily consents to testify as in this case in return for a promise from the judge and the District Attorney.

POINT III

Charge lawful.
(In answer to petitioner's Argument, Point V)

Petitioner argues the charge was unlawful because it did not contain an instruction about accomplice testimony. The contention is Hall was an accomplice as a matter of law or at least it was an issue of fact that should have been submitted to the jury. The legality of the charge was not reviewable by the Court of Appeals because there was no objection, exception or request to charge (Art. VI, § 3, N.Y.S. Const.; § 420-a, Code Crim. Pro.; § 470.05, subd. 2 CPL; *People* v. *Reynolds* [1969] 25 N.Y. 2d 489, p. 495; *People* v. *Adams* [1968] 21 N.Y. 2d 397, p. 403; *People* v. *Rossi* [1962] 11 N.Y. 2d 379, p. 383; *People* v. *Cohen* [1959] 5 N.Y. 2d 282, p. 290; *People* v. *Feld* [1953] 305 N.Y. 322, p. 332; cf. *People* v. *McQueen* [1966] 18 N.Y. 2d 337; *People* v. *Friola* [1962] 11 N.Y. 2d 157).

It is the constitutional, statutory and case law of New York that the legality or lawfulness of the charge is not reviewable by the Court of Appeals absent an objection,

exception or request to charge that would alert the trial judge to the issue now complained of (*supra*).

It was conceded by the petitioner that there was no timely objection, exception or request to charge (petitioner's State Brief, pp. 85-86).

Moreover, the court has concluded (*People* v. *Rossi*, *supra*, p. 383):

> "A witness may not be considered an accomplice unless the evidence establishes that he criminally participated with the defendant in the commission of the crime charged against the latter. (See, e.g., *People* v. *Guadagno*, 9 N.Y. 2d 768, affg. 11 A.D. 2d 1003; *People* v. *Jackerson*, 247 N.Y. 36, 42; *People* v. *Richardson*, 222 N.Y. 103, 113-114; *People* v. *Pasquarello*, 282 App. Div. 405, 407, affd. 306 N.Y. 759; *People* v. *Zucker*, 20 App. Div. 363, 365, affd. 154 N.Y. 770). And since it is in the nature of a defense, 'The burden', we have said, 'rested on the defendant to show that the * * * [witness] was an accomplice'. *People* v. *Richardson*, 222 N.Y. 103, 114, *supra;* see, also, 7 Wigmore, Evidence [3d ed. 1940], pp. 341-343; 1 Underhill, Criminal Evidence [5th ed., 1956], p. 335)."

Testing the rights of the parties by the controlling principles of law suggests Hall was not an accomplice as a matter of law (*People* v. *Rossi*, *supra*). The heart of the issue is guilty knowledge. The question is whether Hall knew petitioner intended to murder his wife with the .22 colt revolver *before* he turned the weapon over to petitioner. Hall insists he did not know petitioner's plans until after petitioner had possession of the gun. Moreover, there is no evidence to the contrary.

The position of Hall is similar to the patients of Dr. Rossi (11 N.Y. 2d 379) who testified they had no knowledge Dr. Rossi falsified his claims against Blue Cross and Blue

Shield. In each case the patient was treated for an illness, condition or sickness not covered in the Blue Cross contract with Sperry, the employer of the patient. Instead of charging or billing the patient, Dr. Rossi submitted a greatly inflated false claim to the insurer representing each patient had bursitis and received a needling of the bursa. Admittedly bursitis was covered by the contract between Blue Cross and Sperry. This court unanimously concluded there was *no* possible view of the evidence that would permit the patients to be charged or indicted as principals with Dr. Rossi in the theft from the insurer.

Mindful that the burden was on the petitioner to prove Hall was an accomplice, what does the record show about the witness. Can it be said he was "concerned in the commission of the crime as 'particeps criminis' " or that he "participated in the criminality of the act?" The People most respectfully submit there is *no* possible view of the evidence to warrant this conclusion and there most certainly is *no* view of the evidence which would require or compel or obligate the court to charge or rule that as a matter of law or even as a question of fact that Hall "compelled, induced or encouraged" or acting with the required mental culpability, solicited, requested, importuned or intentionally aided Pobliner to murder his wife (see § 20.00 Penal Law).

Counsel in his opening to the jury did not claim that Hall took part in the "perpetration of, or preparation for, the crime with intent to assist in the crime." Considering that "the burden rested on the defendant to show that [Hall] was an accomplice" (*People* v. *Richardson* [1917] 222 N.Y. 103, p. 114; *People* v. *Rossi*, *supra*, p. 383), it is clear that under no circumstances could the trial judge rule that, as a matter of law, Hall was a principal. Moreover, none of the prosecution witnesses could have been lawfully indicted along with the petitioner as a principal.

The evidence in the hands of the People before the trial was not materially different from that developed before the jury. We think it is clear that a charge of murder against Joe Hall would not stand because there was not a single item of evidence proving or tending to prove that Hall was "concerned in the commission of the crime as 'particeps criminis' (*People* v. *Pasquarello* [1953, 4th Dept.] 282 App. Div. 405, p. 407, aff'd 306 N.Y. 759).

There was absolutely no evidence whatsoever that Hall "counseled, induced or encouraged" Pobliner to kill his wife. We emphasized that if Hall was, in fact or in law, an accomplice of Hall, he might have been jointly indicted, tried and convicted. Paraphrasing what was said in a somewhat similar connection (*People* v. *Swersky* [1916] 216 N.Y. 471, p. 478):

> "To permit a jury to say that [Hall] did join in it, when the only evidence is that [he] did not would be to permit them to build their verdict upon *speculation and suspicion.*" (Emphasis added.)

The heart of the petitioner's argument seems to be Hall knew *beforehand* that the gun he procured for Pobliner was to be used by Pobliner to kill his wife. However, the uncontradicted evidence is that Hall did not learn until much later that the gun was used to murder Brenda Pobliner. It is, we think, beyond dispute that Hall would not be an accomplice in such case.

As for the necessary evidence, we should be mindful of the rule: "Every act which may have a tendency to assist in the perpetration of the crime is not, of absolute necessity, criminal. Before it will have that effect, it must have been done with the intention on the part of the actor that it shall aid in the commission of the crime. Unless it appears *without dispute* that there was such intention, the person doing the act cannot be said to be a principal. * * *" (*People* v.

Zucker [1st Dept. 1897] 20 App. Div. 363, p. 365 aff'd 154 N.Y. 770). (Italics mine.)

The People most respectfully submit that it does not appear "*without dispute*" that Hall knew what petitioner had in mind.

The posture of Hall in this case becomes apparent if we ask ourselves what evidence would the District Attorney offer if Hall had been indicted. What proof would have been introduced before the jury to establish his guilty connection with Pobliner? Who would the witness be to spell out a prima facie case?

Hall insisted he was not guilty and that he had no beforehand knowledge that Pobliner intended to murder his wife, Brenda, prior to Pobliner getting the .22 revolver. The defense at the trial did not contend that Hall was an accomplice. In fact, the defense in a sense argued most forcefully that Hall was not an accomplice and the defendant was innocent (1349, 1362, 1367, 1968, 1969).

"To permit a jury to say that [Hall] did join in it when the only evidence is that he did not, would be to permit them to build their verdict upon speculation and suspicion." (*People* v. *Swersky* [1916] 216 N.Y. 471, p. 478).

Accordingly, the Court's charge to the jury was proper and lawful in all respects.

CONCLUSION

Certiorari should not be granted.

WILLIAM CAHN
District Attorney
Nassau County
(Attorney for Respondent)

HENRY P. DEVINE
JULES E. ORENSTEIN,
Assistant District Attorneys
of Counsel.

Appendix A

32 N.Y. 356

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent, *v.* JAY T. POBLINER, Appellant.
Argued March 12, 1973; decided May 4, 1973.

Crimes—murder—interception of telephone conversations between defendant and his lawyer before indictment was not sufficient to justify dismissal of indictment; defendant waived right to hearing on wiretap issue; interception did not affect defense—clear and convincing evidence of freedom from taint was sufficient as to testimony claimed to have been related to wiretaps—photographs of decedent's body were related to material evidence and were properly admitted—evidence of defendant's involvement with paramour was admissible on issue of motive—hearing was properly denied on coram nobis application.

1. In a prosecution for murder of his wife, the interception of telephone conversations between defendant and his lawyer before he was indicted was highly improper but was not sufficient to justify dismissal of the indictment. The contention that information elicited on cross-examination of one of defendant's witnesses was previously acquired by the prosecutor from the intercepted communications was not preserved for review on appeal because of defendant's failure to object. Before the trial, when a full hearing was suggested by the prosecutor with respect to all the intercepted conversations, defendant's experienced trial lawyer opposed it. Thereby defendant waived any right he may have had to a full hearing on the wiretap issue. There was no showing that the interception affected the defense at trial in terms of trial strategy, questioning of witnesses, or introduction of evidence. The prosecutor agreed before trial that wiretap conversations would be excluded as would evidence derived from such conversa-

tions. Hearings during trial determined that the People's evidence was not based on wiretap information, whenever experienced trial counsel made objection. Hearings on other points were expressly waived.

2. In the hearings on objections to testimony to be excluded as being related to the wiretaps, clear and convincing evidence of freedom from taint was sufficient.

3. Photographs of decedent's body in the bed where she was shot and two taken at the morgue were admissible since they show that she was asleep when shot rather than awake as contended by the defense and tend to complement other evidence accounting for the cartridges in a box purchased by defendant. The pictures were related to material evidence in the case and were properly admitted. A 30 inch by 40 inch enlargement of one of the photographs was admitted in the trial court's discretion to be used in connection with expert testimony.

4. Evidence of defendant's involvement with a woman with whom he had an illicit relationship was properly admitted. The jury was entitled to consider whether this relationship motivated the murder. It was relevant to show that defendant's relationship with his wife was not a close, affectionate one which might negate a motive to murder.

5. No bearing was required on a motion for a writ of error *coram nobis* on the ground of newly discovered evidence where it appeared that such evidence was known to the defense on the trial.

People v. *Pobliner*, 39 A D 2d 1018, affirmed.

APPEAL, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the

Supreme Court in the Second Judicial Department, entered June 26, 1972, which affirmred (1) a judgment of the County Court of Nassau County (PAUL J. KELLY, J.), rendered upon a verdict convicting defendant of murder, and (2) a subsequent order of said court, denying an application by defendant in the nature of error *coram nobis*.

Stanley S. Arkin for appellant. I. Wiretapping conducted by the prosecution violated appellant's constitutional rights and requires a reversal of his conviction and a dismissal of the indictment. II. Appellant was denied his right to the effective assistance of counsel. (*O'Brien* v. *United States*, 386 U.S. 345; *Black* v. *United States*, 385 U.S. 26; *People* v. *Morhouse*, 21 NY 2d 66; *Lanza* v. *New York State Joint Legislative Committee on Govt. Operations*, 3 NY 2d 92; *Matter of Fusco* v. *Moses*, 304 N.Y. 424; *People* v. *Rainey*, 34 AD 2d 557; *Taglianetti* v. *United States*, 398 F. 2d 558, 394 U.S. 316; *Caldwell* v. *United States*, 205 F. 2d 879; *Coplon* v. *United States*, 191 F. 2d 749; *Matter of Terkeltoub* 256 F. Supp. 683.) III. The contents of privileged conversations were used by the prosecution at trial to cross-examine and impeach Illis Jurisson, key witness for the defense. (*Burgett* v. *Texas*, 389 U.S. 109; *Hoffa* v. *United States*, 385 U.S. 293; *Pointer* v. *Texas*, 380 U.S. 400; *Massiah* v. *United States*, 377 U.S. 201.) IV. The failure of the trial court to conduct a full hearing on the legality of the wiretap order, and to use the proper standard of proof to determine if there was taint, was error. (*Kolod* v. *United States*, 390 U.S. 136; *People* v. *Munger*, 24 NY 2d 445; *People* v. *Morhouse*, 21 NY 2d 66, 27 NY 2d 896, 34 AD 2d 769; *People* v. *McCall*, 17 NY 2d 152; *People* v. *Barnes*, 34 AD 2d 631; *People* v. *Butler*, 33 AD 2d 675; *People* v. *Ford*, 61 Misc 2d 419; *United States* v. *Schipani*, 289 F. Supp. 43, 414 F. 2d 1262; *People* v. *Huntley*, 15 NY

2d 72; *People* v. *Mendez*, 28 NY 2d 94.) V. Appellant was deprived of a fair trial by the improper admission into evidence of highly prejudicial testimony and exhibits. VI. The admission of sensational physical evidence relating to blood was improper. (*People* v. *Rial*, 25 AD 2d 28; *People* v. *Silverman*, 252 App. Div. 149; *People* v. *Schweininger*, 25 AD 2d 769, 19 NY 2d 872, 393 U.S. 861.) VII. The testimony that witnesses had had sexual relations with appellant was irrelevant and prejudicial. (*People* v. *Namer*, 309 N.Y. 458; *People* v. *Fitzgerald*, 156 N.Y. 253; *People* v. *Steiner*, 30 NY 2d 762; *People* v. *Harris*, 209 N.Y. 70; *People* v. *Canty*, 31 AD 2d 976.) VIII. The admission of weapon evidence not linked to the crime was improper. (*People* v. *Miller*, 22 AD 2d 958, 17 NY 2d 559; *People* v. *Ochs*, 9 AD 2d 792; *People* v. *Benoit*, 8 AD 2d 626.) IX. The trial court's permitting the prosecution to equate appellant's silence and crying in response to the question of whether he killed his wife to an admission of guilt was improper. (*People* v. *Dziobecki*, 3 AD 2d 493, 3 NY 2d 997; *People* v. *Allen*, 300 N.Y. 222; *People* v. *Conrow*, 200 N.Y. 356; *People* v. *Koerner*, 154 N.Y. 355.) X. The failure of the trial court to instruct the jury with respect to accomplice testimony and the requirement of corroboration was error requiring reversal. (*People* v. *Wheatman*, 31 NY 2d 12; *People* v. *White*, 26 NY 2d 276; *People* v. *Kupperschmidt*, 237 N.Y. 463; *People* v. *Sweeney*, 213 N.Y. 37.) XI. The trial court erred by denying, without a hearing, appellant's application to vacate the judgment. (*Brady* v. *Maryland*, 373 U.S. 83; *People* v. *Ahmed*, 20 NY 2d 958; *People* v. *Zimmerman*, 10 NY 2d 430; *People* v. *Yamin*, 45 Misc 2d 407.)

William Cahn, District Attorney (*Henry P. DeVine* of counsel), for respondent. I. Guilt was established beyond

a reasonable doubt. (*People* v. *Paulin*, 25 NY 2d 445; *People* v. *Stephen J. B.*, 23 NY 2d 611; *People* v. *Rodney P.*, 21 NY 2d 1; *People* v. *Leonti*, 18 NY 2d 384; *People* v. *Gates*, 24 NY 2d 666; *People* v. *Bretagna*, 298 N.Y. 323.) II. The trial was fair. (*People* v. *Singer*, 300 N.Y. 120; *People* v. *Webster*, 139 N.Y. 73; *Walsh* v. *People*, 88 N.Y. 458; *Cowley* v. *People*, 83 N.Y. 464; *People* v. *Lewis*, 7 AD 2d 732; *People* v. *McKie*, 25 NY 2d 19; *People* v. *Leonti*, 18 NY 2d 384; *People* v. *McQueen*, 18 NY 2d 337; *People* v. *Gunner*, 15 NY 2d 226; *People* v. *La Marca*, 3 NY 2d 452.) III. The charge was lawful. (*People* v. *Reynolds*, 25 NY 2d 489; *People* v. *Adams*, 21 NY 2d 397; *People* v. *Rossi*, 11 NY 2d 379; *People* v. *Cohen*, 5 NY 2d 282; *People* v. *Feld*, 305 N.Y. 322; *People* v. *McQueen*, 18 NY 2d 337; *People* v. *Friola*, 11 NY 2d 157; *People* v. *Pasquarello*, 282 App. Div. 405, 306 N.Y. 759; *People* v. *Swersky*, 216 N.Y. 471.) IV. The wiretap was not unlawful. V. The cross-examination of Jurisson proper. (*People* v. *McCormick*, 31 NY 2d 807; *People* v. *Berrios*, 28 NY 2d 361; *People* v. *Reynolds*, 25 NY 2d 489; *People* v. *Gates*, 24 NY 2d 666; *People* v. *De Renzzio*, 19 NY 2d 45; *People* v. *McQueen*, 18 NY 2d 337; *People* v. *Friola*, 11 NY 2d 157; *People* v. *Mendez*, 28 NY 2d 94; *People* v. *Morhouse*, 21 NY 2d 66; *People* v. *Scharfstein*, 52 Misc 2d 976.) VI. Appellant waived his right to a formal hearing. (*People* v. *McCall*, 17 NY 2d 152; *People* v. *Berrios*, 28 NY 2d 361; *People* v. *Baldwin*, 25 NY 2d 66; *People* v. *Whitehurst*, 25 NY 2d 389; *People* v. *Alfinito*, 16 NY 2d 181; *People* v. *Malinsky*, 15 NY 2d 86; *People* v. *Mendez*, 28 NY 2d 94; *People* v. *Morhouse*, 21 NY 2d 66; *Wong Sun* v. *United States*, 371 U.S. 471; *Nardone* v. *United States*, 308 U.S. 338.) VII. Conversations between Handman and appellant about Jurisson not privileged. (*Britton* v. *Lorenz*, 45 N.Y. 51; *Bacon* v. *Frisbie*, 80 N.Y.

394; *People* v. *Buchanan*, 145 N.Y. 1; *United States* v. *Weinberg*, 226 F. 2d 161; *People* v. *Cooper*, 307 N.Y. 253; *Sawyer* v. *Stanley*, 241 Ala. 39; *United States* v. *Summe*, 208 F. Supp. 925.) VIII. A *coram nobis* hearing was not necessary. (*People* v. *Fein*, 18 NY 2d 162; *People* v. *Mistretta*, 7 NY 2d 843; *People* v. *Girardi*, 303 N.Y. 887; *People* v. *Luciano*, 275 N.Y. 547; *Mooney* v. *Holohan*, 294 U.S. 103; *Giles* v. *Maryland*, 386 U.S. 66; *Miller* v. *Pate*, 386 U.S. 1; *Brady* v. *Maryland*, 373 U.S. 83; *Wilde* v. *Wyoming*, 362 U.S. 607; *Alcorta* v. *Texas*, 355 U.S. 28.)

BREITEL, J. Defendant appeals from a conviction for the murder of his wife and the denial of his postconviction motion to vacate the judgment.

A primary issue is whether intercepted telephone conversations between defendant and his lawyers before he was indicted, so invaded the counsels of the defense that a dismissal of the indictment is required. A related issue is whether defendant's trial attorney intentionally waived a hearing on the legality and effect of the wiretap, and waived objection to the alleged, but disputed, use by the prosecutor of wiretap information on cross-examination of the principal defense witness. Other contentions turn on the admission into evidence of blown-up photographs of the blood-stained corpse, and testimony about defendant's extramarital sexual relations. Defendant also contends that the trial court erred in denying, without a hearing, his motion to vacate the judgment based on newly-discovered evidence.

There should be an affirmance. Although the interception of the lawyer-client telephone conversations was grossly improper, the counsels of the defense were not so invaded that the indictment should be dismissed. On the related

issue whether improperly obtained wiretap evidence was used indirectly by the prosecution, the court properly found that there was no such use. In that connection, defendant either had a hearing during trial or waived his right to a hearing, in seeking to establish such indirect use. The remaining issues raised do not reveal error in the trial.

On December 27, 1968, the bloody corpse of Brenda Pobliner was found in a sleeping position in the marital bed, with three clustered bullet wounds near her left temple. Brenda and her husband, defendant Jay Pobliner, had lived with their 15-month-old son in Merrick, Long Island. It was a second marriage for each. The evening before the murder, Jay had brought home a male friend, Illis Jurisson. The three apparently spent a quiet evening having a couple of drinks and watching television. According to Joe Hall, a friend of Jay's from North Carolina, Jay admitted to him that, while she slept, he shot his wife with a pistol in the presence of Jurisson the following morning. That morning Jay fed a bottle to the couple's 15-month-old boy, and then drove Jurisson to Manhattan. Defendant had breakfast with his parents in Manhattan and then went to work in a family business arranging travel tours.

After arriving at work, he called his wife, and receiving no answer, called a neighbor, a Mrs. Pober. Mrs. Pober discovered the body, telephoned the police, and then her husband to ask him to call Jay and tell him something was wrong. She did not tell her husband what was wrong with Brenda and did not say anything about blood. Her husband called defendant and told him only that something was wrong and to come home. Defendant then spoke to the men where his automobile was parked, asking for someone to drive him to his home because he was too nervous to drive.

He told them that his wife was "bleeding". The prosecution relied heavily on Jay's "guilty knowledge" of the bleeding and his detailed admissions to Joe Hall. Although the murder weapon was never recovered, the prosecution established defendant's prior purchase of an unregistered pistol through Joe Hall, which could have been the weapon used. The defense relied primarily on the alibi testimony of Jurisson.

Immediately after the murder, defendant Jay and Jurisson apparently co-operated with the police investigation. Both were questioned at length, and gave exculpatory signed statements. Lie detector and paraffin tests were performed and Jay's clothes were scientifically examined. The results of these tests were evidently unproductive.

After the murder, Jay and his child stayed with his parents in their Manhattan apartment. The police, concentrating their investigation on Jay, but, as the District Attorney's brief states, "Having run into a stone wall", obtained two judicial eavesdropping orders for two telephones in the parents' apartment. All telephone conversations were recorded from about January 16, 1969 to February 5, 1969.

On March 24, 1969, Joe Hall, who had asked to speak to someone in the District Attorney's office, revealed Jay's admissions to him. Jay was indicted March 28, 1969.

The transcript of recorded conversations contains 1,338 pages. Eleven conversations were recorded between Jay and a lawyer-friend, one Handman; ten conversations between one of Jay's parents and Handman; eight between Jay and his private investigator; and three between Jay's parents and the investigator. One conversation between Jay and his trial attorney was reflected in the detective's

notes but was not recorded in the transcript. There was one recorded conversation between Jay and the trial attorney's law partner.

Much of the recorded conversations were concerned with the progress of police investigations, defendant's plans for investigation, or were simply to arrange conferences among Jay, his lawyers, and investigator. There were discussions of possible witnesses, including Jurisson, and of Jay's plans to visit Asheville, North Carolina.

Some conversations between Jay and his lawyer-friend involved treatment of Jurisson's mental condition. The District Attorney asserts that by getting Jurisson admitted to a private hospital for shock treatments, Jay and his lawyer were intentionally destroying material evidence. The District Attorney, therefore, argues that the conversations involved commission of a crime which would not be covered by any confidential privilege. The conversations between Jay and his lawyer show that they arranged for Jurisson's admission to the hospital; that they fretted about what Jurisson might say to the police; and that Jay's family paid a Jurisson hospital bill of $900.

At the preliminary hearing (prior to the first trial which ended in a mistrial) defendant's trial attorney moved for a hearing on the validity of the wiretap, citing the invasion of the lawyer-client conversations. The prosecutor advised the court that no wiretap evidence and no evidence discovered as a result of the tap would be used on the People's direct case. On that representation, the court ruled that it would not permit use of the wiretaps, either directly or indirectly. Mr. Edelbaum, the trial attorney, however, who had listened to the tapes, was advised to object during trial to the intro-

duction of evidence, if ascribed by him to the wiretaps. At the first and second trials, Edelbaum also moved to dismiss the indictment, because of the invasion of "privacy between attorney and client". The motion was denied. The prosecutor and the court agreed, nevertheless, that defendant was entitled to a hearing to explore the content of certain blank tapes and the circumstances of their erasure. Edelbaum first said he did not want such a hearing, and when it was offered again he reserved decision over the weekend, and apparently did not bring up the subject again.

At the second trial beginning September 8, 1970, Edelbaum asked whether and was informed that the court would make the same rulings on the wiretap evidence. After selection of the jury, the prosecutor suggested that since the validity of the wiretaps had never been determined, a hearing for that purpose should be held at the outset. Edelbaum objected strongly, requesting the court to adhere to its original decision which had the effect of denying the prosecution direct wiretap evidence or indirect evidence from wiretap leads. He also feared that the jury might be prejudiced by the delay. The court adhered to its original determination.

Defendant contends that the direct, intentional intrusion into defendant's confidential relationship with his lawyers requires dismissal of the indictment. He cites no New York case which would support an outright dismissal of the indictment. He relies on the statement in *Hoffa* v. *United States* (385 U.S. 293) that "[i]t is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth

Amendment" (at p. 308; see, also, *United States* v. *Balistrieri*, 403 F. 2d 472, 477-478 [7th Cir.], vacated 395 U.S. 710, appeal from determination on remand 436 F. 2d 1212, 1214-1215, cert. den. 402 U.S. 953; *Caldwell* v. *United States*, 205 F. 2d 879, 881, n. 11 [D.C. Cir.]).

Dismissal of the indictment is a drastic remedy, seldom employed, to sanction illegal seizure of evidence, as distinguished from the preclusion of illegal evidence. As the Supreme Court stated in *United States* v. *Blue*, with respect to the privilege against self incrimination: "[A defendant] would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. [Citations omitted.] Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." (384 U.S. 251, 255 [per HARLAN, J.]; see, also, *United States* v. *Mancuso*, 378 F. 2d 612, 617-618 [4th Cir.], cert. den. 390 U.S. 955).

Interference with the right to counsel may, nevertheless, as suggested in the *Hoffa* case, require dismissal of the indictment in an appropriate case (*State* v. *Cory*, 62 Wn. 2d 371). In the *Cory* case, defendant was charged with 12

counts of burglary and larceny. While in jail awaiting and during trial, defendant consulted with his attorney in a jail conference room. During trial it was discovered that a microphone had been placed in the conference room and the Sheriff and his officers had been listening to the privileged conversations. In dismissing the indictment, the Washington high court stated: "There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy."[1] (62 Wn. 2d, *supra*, at p. 377).

It would appear that it is not sufficient to justify dismissal of the indictment merely to show that attorney-client

1. In a later case the same court, referring to the *Cory* case (*supra*), stated: "Dismissal of charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial." (*State* v. *Baker*, 78 Wn. 2d 327, 332-333). It should be observed, and indeed emphasized, that the requirement of prejudice shown relates to dismissal of the indictment for invasion of counsels of the defense. The preclusion of evidence obtained in any invasion of the cient-lawyer privilege, is unqualified by any such requirement.

conversations were intercepted (see, e.g., *People* v. *Morhouse*, 21 NY 2d 66, 77-78; *Lanza* v. *New York State Joint Legislative Committee*, 3 NY 2d 92, 98; *People* v. *Cooper*, 307 N.Y. 253, 259-260; *O'Brien* v. *United States*, 386 U.S. 345; *Black* v. *United States*, 385 U.S. 26). It must be shown that the interception undermined the right to counsel and that the interference could not be cured by holding a new trial. In other words, it must appear to warrant dismissal, as distinguished from the limited sanction of exclusion of evidence, that the prosecution could or would necessarily avail itself of the illegal evidence directly or indirectly by way of strategy, or tactics, which it could not have but for the unlawful wiretap.

Concretely, defendant contends that intercepted privileged communications were used to cross-examine and impeach Jurisson, the key alibi witness for the defense. Otherwise, defendant does not suggest that any other use was made at the trial of privileged communications or that the improper interception in any other way affected the defense.

On direct examination, after giving the alibi testimony, Jurisson admitted having been in a hospital early in 1969 for about five weeks, although he had no memory of entering the hospital, and that he had received "certain treatments". On cross-examination Jurisson testified that defendant and his lawyer Handman had taken him to the hospital; that he had been given sedation and electrotherapy; and that defendant's father had paid $900 of his medical expenses. No objection was made to this cross-examination.

Defendant now argues that the information elicited on cross-examination was previously acquired by the prosecu-

tor from intercepted, privileged communications. All of this information was, indeed, as noted earlier, available in the intercepted conversations. The District Attorney asserts, however, that the information was also available from independent sources. The opposing contentions should have been tested at trial, after a proper objection raising the issue. Because of the failure to object the issue is not preserved for appeal (CPL 470.05, subd. 2; e.g., *People* v. *Rullo*, 31 NY 2d 894, 895; cf. *People* v. *De Renzzio*, 19 NY 2d 45, 50; but cf. *People* v. *McLucas*, 15 NY 2d 167, 172). As will be described in some detail defense counsel first agreed and then urged that the procedure to test the effect of the questioned tapes should be on a limited basis.

Defendant argues that even if the indictment should not be dismissed, there should at least be a reversal of the conviction and a direction to hold a hearing to determine the validity of the wiretap. Defendant cites various cases in which convictions were reversed, but all are distinguishable on the ground that at the time of trial, the wiretap of attorney-client conversations was not known by the court or the defense (e.g., *O'Brien* v. *United States*, 386 U.S. 345, *supra; Black* v. *United States*, 385 U.S. 26, *supra*).

In this case, the existence of the wiretap was of course known, and defense counsel had listened to the tapes. Two of the tapes were inaudible, but defense counsel, as stated above, declined the opportunity for a hearing to determine the circumstances of their erasure, offered at the first trial by the court and the prosecution. A hearing to determine the validity of the wiretap and the admissibility of recorded conversations was, as stated, requested and denied at the first trial on the representation by the prosecution that neither the conversations nor evidence derived from them

would be introduced by the People on the direct case. The court followed a practice of holding a hearing during trial whenever evidence was challenged by the defense as based on wiretap conversations. Objections were made to the testimony of two damaging prosecution witnesses, Gaines and Hall. In this instance, a hearing was held out of the presence of the jury, and the court found by "clear and convincing" evidence that the police had a basis independent of the wiretap for learning of their existence. Apparently, Gaines had inquired at defendant's house the day of the homicide, and had employed defendant's former maid; Hall's name was listed in an address book of the deceased, and he was named by a local physician as someone the deceased feared.

The practice of holding wiretap hearings during trial was impliedly sanctioned in *People* v. *Morhouse* (21 NY 2d 66, *supra*) where the court remitted a case for a hearing on "whether the People's evidence on defendant's trial was 'tainted' by * * * improper eavesdropping", but the conviction was not reversed (*id.*, at p. 77). It was determined at the hearing on remittal that there was no "taint" and the conviction was upheld (34 AD 2d 769, affd. 27 NY 2d 896). In the instant case, where the prosecution had advised that it would not use the questioned wiretaps or evidence derived from them, hearings during the trial rather than one hearing at the outset were desirable as a practical matter. Because of the voluminous wiretap transcript, in order to effect the exclusion of evidence derived from the wiretap almost the entire case of the People would have to be disclosed to give the defense adequate opportunity to argue for suppression. It was as the prosecutor stated at trial "premature" and "a shot in the dark" to hold a hearing on possible "taint" at the outset.

In any event, regardless of what the proper or best procedure might be, when a full hearing was suggested by the prosecutor at the second trial, defendant's attorney, a lawyer of many years' experience at the criminal bar, strenuously opposed it. His argument to the trial court shows his concern that if there were a full hearing on the legality and effect of the wiretap, some of the wiretap evidence, already excluded with the prosecutor's consent and by court order, might become admissible against his client. Under the circumstances, defendant waived any right he may have had to a full hearing on the wiretap issue.

Defendant also objects to the use of the "clear and convincing" standard of proof in the hearings on the objections to the testimony of Gaines and Hall. He argues that the beyond-a-reasonable-doubt test is required.

Although no case in New York has been found expressly laying down the proper standard of proof, the court in *People* v. *Mendez* (28 NY 2d 94) appears to have applied a lower standard than "beyond a reasonable doubt". The court allowed testimony of a witness who volunteered information to the police where "[i]t seem[ed] reasonably clear that it was probable or at least possible that lawful surveillance of the suspected defendant, without the information acquired by the wiretap, would have led the police to the witness in any event" (*id.*, at p. 101). The standards applied in identification hearings on the issue of taint by prior suggestive "show-up" is "clear and convincing evidence" (*People* v. *Ballott*, 20 NY 2d 600, 606; *United States* v. *Wade*, 388 U.S. 218, 240), but the voluntariness of a confession must be established "beyond a reasonable doubt" (*People* v. *Huntley*, 15 NY 2d 72, 78).

Appendix A

There appears to be no impediment under the Federal Constitution to applying a lower standard of proof. Recently, in *Lego* v. *Twomey* (404 U.S. 477), the Supreme Court, contrary to the New York rule in this particular respect, held that voluntariness of confessions may be established "by a preponderance of the evidence." (*id.*, at p. 489). The court stated its rationale: "Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by revising the standards applicable in collateral proceedings. Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." (404 U.S., *supra*, at pp. 488-489.) The same reasoning should apply in this case to questioned wiretaps. Moreover, it is very doubtful that intensifying the burden of proof beyond a showing by clear and convincing evidence would change the determination whether Gaines and Hall were discovered by the police from independent sources.

In summary, the wiretap of attorney-client conversations was highly improper, raising a difficult question whether the indictment should be dismissed.[2] In this instance,

2. This court and others have often condemned, without reservation, any intrusion into private communications between counsel and client (e.g., *People* v. *Cooper*, 307 N.Y. 253, 259; *Matter of Fusco* v. *Moses*, 304 N.Y. 424, 433; *Classer* v. *United States*, 315 U.S. 60. 76; *Coplon* v. *United States*, 191 F. 2d 749, 760 [D.C. Cir.], cert. den. 342 U.S. 926).

however, there was no showing that the interception affected the defense at trial in terms of trial strategy, questioning of witnesses, or introduction of evidence. The prosecutor agreed before trial that wiretap conversations would be excluded as would evidence derived from such conversations. Hearings during trial determined that the People's evidence was not based on wiretap information, whenever experienced trial counsel made objection. Defendant has not sustained his attack on the standard of proof correctly used by the hearing court. Hearings on other points were expressly waived. In short, there is no showing that the defense on this trial was in any way affected by the improper interception, or that any purpose would be served by requiring another trial.

Defendant also contends that admission into evidence of large color photographs of Brenda Pobliner's body in the bed where she was shot, and two taken at the morgue were improper and prejudicial. He argues that the detectives could have identified and described the position of the body avoiding the inflammatory impact on the jury.

The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence or to corroborate or disprove some other evidence offered or to be offered (Ann., Evidence—Photograph of Corpse, 73 ALR 2d 769, 775-779; cf. *People* v. *Webster*, 139 N.Y. 73, 83; *People* v. *Fish*, 125 N.Y. 136, 147-148; *People* v. *Lewis*, 7 AD 2d 732). Admission of photographs of homicide victims is generally within the discretion of the trial court (Ann., Evidence—Photograph of Corpse, 73 ALR 2d 769, 780-782, *supra;* 3 Wharton's Criminal Evidence [13th ed.], § 637, p. 281). Where they are other-

wise properly admitted as having a tendency to prove or disprove some material fact in issue, photographs of a corpse are admissible even though they "portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury" (Ann., Evidence—Photograph of Corpse, 73 ALR 2d 769, 787, *supra;* see 3 Wharton's *op. cit., supra,* § 637, pp. 289-290; Richardson, Evidence [9th ed.], § 131; cf. *People* v. *Singer,* 300 N.Y. 120, 122). There are many cases in which photographs of a homicide victim have been held admissible to show, for example, the position of the victim's body, the wounds of the victim, or to illustrate expert testimony (3 Wharton's *op. cit., supra,* § 627, pp. 296-309, esp. cases cited in ns. 37, 39, and 51). Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant (see Ann., Evidence—Photograph of Corpse, 73 ALR 2d 769, 802-807, *supra;* cf. *People* v. *Rial,* 25 AD 2d 28, 30; *People* v. *Lewis,* 7 AD 2d 732, *supra*).

In the instant case, the theory of the prosecution was that defendant had killed his wife while she slept. Defendant had told Hall that Brenda "was asleep when he shot her". The defense was based on the assumption that a burglar had surprised Brenda in the bedroom and had shot her. Notably, defendant was a licensed possessor of a variety of firearms.

The four photographs show, quite definitively, that the deceased was in her bed, in a sleeping position, when shot, thus tending to confirm Hall's testimony. The two photographs taken at the morgue show the three clustered bullet holes near the left temple, indicating marksmanship and deliberateness in the killing. They also tend to comple-

ment other evidence accounting for the cartridges in a box purchased by the defendant. Under the circumstances, the pictures related to material issues in this case, and, therefore, were properly admitted. A 30-inch x 40-inch blow-up of one of the photographs of the deceased in the bed was admitted in the trial court's discretion to be used in connection with expert testimony.

Defendant also contends that it was improper and prejudicial to admit testimony of a woman friend that she had had sexual relations with the defendant. He argues that it was first necessary to show marital strife and a deep personal involvement with the paramour.

Suffice it to say that the jury would have been entitled to find a classic triangular relationship in this instance. During the fall and early winter before the killing, the paramour and defendant had relations on 10 to 12 occasions. She was not just a casual pick-up. Defendant introduced her to his son by his first marriage and at his place of employment. Defendant gave her a ring for her birthday and a watch for Christmas. The murder occured two days after Christmas. That morning, after Mr. Pober called defendant at work but before he was driven home, he telephoned her. The jury was entitled to consider whether this relationship motivated the murder. Certainly, it was relevant to show that the defendant's relationship with his wife was not a close affectionate one which might negate a motive to murder.

Finally, defendant contends that he was improperly denied a hearing on his motion to vacate in the nature of *coram nobis*. The motion was made on the ground of newly-discovered evidence. Defendant asserts that a Mrs. Pollack has been discovered who would testify that Mrs. Pober

had admitted that she had told her husband that Brenda was bleeding.

No hearing on these allegations was required. On a prior motion for a new trial, defendant's lawyer-friend had averred that "Prior to and during the trial" he had reported to trial counsel that a Mrs. Pollack was available to testify that Mrs. Pober had told her husband Brenda was "covered with blood and bleeding."

Other alleged errors need no discussion.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge FULD and Judges BURKE, JASEN, GABRIELLI, JONES and WACHTLER concur.

Order affirmed.

Appendix B

New York Court of Appeals Order Denying Rehearing

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 19th day of September A.D. 1973.

Mo. #639

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—vs.—

JAY T. POBLINER,

Appellant.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

JAMES M. FLAVIN
Clerk

Appendix C

(The Twelve Conversations between Petitioner and his Lawyers)

(1) In a conversation between petitioner and Maurice Edelbaum (A1345), petitioner advised he was leaving the area the next day and would return home the following Friday. Another conversation immediately following, not with a lawyer, indicated the defendant was flying to Fort Lauderdale and thereafter Oklahoma.

(2) Petitioner spoke with his lawyer and friend, Herbert Handman (A300-304) and reported that a friend, Lieutenant Clarence Wellborn of the Asheville Police Department, had found petitioner's former maid, Effie Mae, who had already been questioned and spoken to by the Nassau County Police. Petitioner also reported that a sergeant of the Nassau County Police had called down South, indicating the Nassau Police would be down again in a few days (A383-389, A1371).

In the same conversation with Mr. Handman, the lawyer reported the Nassau Police wished to go to the petitioner's Merrick home to pick up Effie Mae's clothing. Handman asked petitioner to stop by at his office and told petitioner Handman would be meeting with Edelbaum the next day.

(3) In another conversation between the petitioner and Handman (A445-457), petitioner told the lawyer he spoke with his investigator, Hy Rosenblatt, who wished to meet at the lawyer's office tomorrow. Petitioner told Handman Lieutenant Wellborn had seen Effie Mae, who told him she told the Police that the petitioner and Brenda were very happy together and that this was what Hy wished to know. Petitioner also reported he had told the investigator that Wellborn would help the investigator in Asheville (A435-439).

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In this same conversation with Handman, the petitioner and his lawyer spoke about making a doctor's appointment for Illis (A457-514).

(4) In another conversation (A534-36) petitioner had a vague discussion about talking to a doctor, and the doctor did not go along with something. Handman told petitioner to call him if anything came up.

(5) The petitioner again spoke with Handman (A581-87) who advised he had called Maurice, Phil and Abrams, without any luck, and he would try again in fifteen or twenty minutes. The petitioner was told to call if anything came up or happened, and Handman told the petitioner to let his father know about the hospital. Handman said he would see the petitioner the next day, and he would call the hospital and see what's doing and would call back.

(6) Handman called the petitioner (A588-93) and his father, telling them the hospital had called and that Illis was asleep. This was followed by some vague discussion about Illis' actions, and they all agreed they would speak with each other on the next day.

(7) This was a conversation between petitioner and Handman (A616-17) in which he said he would call the petitioner back.

(8) In this conversation (A617-32), Handman advised the petitioner he spoke with the attorney for Squibb regarding the status of Illis and that Illis had spoken with some people at Squibb. It was also reported to the petitioner that Handman had spoken to the doctors and apparently Illis had been using the hospital telephones. There was a general conversation about the prognosis and diagnosis of Illis' troubles in the hospital, it appearing that Illis went berserk

at his place of employment, Squibb's. Mention is also made that Illis had a drinking problem and it would be left up to the doctors as to whether they could visit Illis. Lastly, the petitioner advised he was going to see Edelbaum on Saturday. The conversation closed with Handman's request that petitioner call him if anything came up.

With reference to the conversations numbered 4 through 8 inclusive, *supra*, there were other calls between the petitioner's mother and other persons, as well as petitioner's father and mother, and petitioner and other friends, and the like, discussing Illis having a nervous breakdown, cracking up and being in the hospital (A599-600, A612, A967, A866-72, A765, A790, A1051).

(9) In this conversation between Handman, Mrs. Pobliner and the petitioner (A895-903), the petitioner advised that Hy (the investigator) had just called and arrangements were made to go out the next morning. There was some vague talk about whether Mr. Handman brought up something to Mr. Edelbaum. With respect to Illis, it was reported the doctor said he was more cooperative. The attorneys stated he did not wish to talk on the phone and indicated he would see the petitioner tomorrow, would be meeting Edelbaum tomorrow and arrangements were made for petitioner to pick up Handman the following morning.

(10) The petitioner conversed with Handman (A1160-64), reporting he was home, and made inquiry about whether there was anything to tell. Reference was made to petitioner's father telling something tomorrow and that there was an 11:30 A.M. meeting set up. With respect to Illis, it was reported he was still a sick man.

(11) In this conversation (A1210-22) Handman indicated he spoke with Mr. Edelbaum, who thought it was a good idea about the Lieutenant. Handman also stated

Appendix C

Edelbaum had spoken to Hy, who was up to date on everything. Apparently Illis' mother called Mr. Handman, who told the petitioner she was upset. Petitioner and Handman then discussed a Boston murder case. The petitioner made some reference to some woman connected with Miss Universe contest contacting him. Mr. Handman indicated they would talk about it and they would check with Maurice.

(12) Here (A1289-1306), the petitioner reported to Mr. Handman about a friend of his who gave him the names of doctors. Apparently this friend was upset and so was Illis' mother, who had called the doctor because the mother apparently had signed some papers permitting the administration of shock treatments to Illis. The friends petitioner referred to here were "Ellie" or "Elaine" and a "Mark," and petitioner advised that Elaine would call Mr. Handman. The petitioner also reminded Handman he was going to go to Fort Lauderdale, and he asked Handman to speak to Mr. Edelbaum about "that other thing."

(In connection with the last series of telephone conversations there are a number of additional conversations between Mrs. Pobliner and friends of the family, Mr. Pobliner, Sr. and a friend of the petitioner, and the petitioner with other friends, in which there is discussed the fact that the petitioner went to his house with the lawyer and a blood expert, where measurements of the room, and photos, were taken, and the petitioner was there for six hours (A1001-1002, A1044, *et seq.*, A1048-49, A1051, *et seq.*, A1074, *et seq.*, A1080, A1103-04, A1270, *et seq.*). There are also conversations between petitioner and friends Ellie or Elaine and Mark (A790-815, A815-32, A1245-83) concerning Illis and shock treatments).

Appendix D

(Conversations between the Petitioner and Investigator Rosenblatt)

(1) In a conversation between Hyman Rosenblatt and Mr. Pobliner, Sr. (A249-56), the investigator reported he had been sick and was hoping to go out tomorrow and start work, and that Mr. Edelbaum had looked at the house. The elder Pobliner told the investigator Edelbaum was going to get an expert to take pictures. The investigator stated everything would be done. The petitioner got on the phone and offered any assistance to the investigator. The investigator then told petitioner he was going to circulate in the petitioner's neighborhood to get statements from people there. The investigator requested petitioner to meet him at his office at 11:00 A.M., and Mr. Pobliner Sr. chimed in and asked the investigator to check out a dope addict who had killed a woman in Brooklyn and to check out the report.

(2) The petitioner reported to the investigator (A304-12) about receiving a call from his Lt. Wellborn who advised he had spoken to the maid, Effie Mae, who said she wouldn't talk because the New York Police scared her. The petitioner further reported he was advised by his lieutenant friend that Sergeant Bonora had telephoned, indicating the Nassau Police would be down in a few days. Petitioner also told the investigator his lawyer advised him the detective wanted to go to his house to get the maid's clothing to give to her. The two men discussed what Effie, the maid, may have said.

In a conversation between the petitioner and one of his friends the petitioner told the friend he was meeting the investigator the following morning and that he and a

criminologist, plus Mr. Edelbaum, would go to the petioner's house on the forthcoming Saturday (A273, *et seq.*).

(3) In another conversation between the petitioner and the investigator, Rosenblatt (A312-15), the petitioner advised again that the Lieutenant—Clarence—had spoken with Effie Mae the previous week and the two men then speculated about the Nassau cops possibly having hidden Effie Mae. The investigator asked the petitioner to see if he could find out through his lieutenant friend exactly when the lieutenant had spoken with Effie Mae and whether or not she was still around. The investigator asked that petitioner call him as soon as he got this information.

(4) In this conversation between the investigator and the petitioner (A425-31), the investigator again asked if the petitioner found out when the Police spoke to Effie Mae down South and that the Police wanted her clothes, and again speculated as to whether they had brought her up North. He asked that petitioner call him back and let him know.

At A431-35, the petitioner placed a call to his friend, Clarence in Asheville, telling him what his investigator wanted to know about when Clarence spoke with Effie Mae and if she was still around, and to please call him back. The lieutenant then called back (A435), reporting Effie Mae was still there and had told the Police (the Nassau Police) all good things about the petitioner and his late wife—that they were in love and got along fine.

(5) The petitioner reported to investigator Rosenblatt (A441-45) that his friend Clarence told him Effie Mae was still there and she told the Police only good things about the petitioner and his wife. Rosenblatt indicated he was

puzzled because there had been a request for her clothes by the Nassau Police and the two made arrangements to meet at the office the following morning.

(6) Petitioner reported to the investigator (A892-95) he was going to his house the next day with Handman. The investigator said he wanted to go, and the petitioner arranged to pick him up the next day.

(7) The petitioner just arrived home after a bad flight (A1190-96), and arrangements were made to be at the lawyer's office the next day. There was unintelligible talk about something the petitioner told the investigator but had not yet told his father or the lawyer. The investigator advised petitioner that Mr. Pobliner, Sr. had left a message for the investigator to call him back. The petitioner reported his in-laws down South told him the Police came to see them and told the in-laws they were leaving and would not be bothering them again. The petitioner said he would call the investigator after he had spoken with his father and lawyer.

(8) The investigator called the petitioner (A1242-44) and petitioner arranged to pick up the investigator the following morning at the investigator's house.

Appendix E

(Conversations between Petitioner's Parents and Lawyers)

(1) An individual named Abrams, speaking to Mr. Pobliner, Sr. (A1-3) advised that arrangements had been made for petitioner to meet with Mr. Edelbaum the next day at 4:30 P.M. Another earlier appointment was cancelled and Abrams asked that Handman be notified.

(2) In a conversation, Mr. Pobliner, Sr. asked Handman (A111-12) if Hy (the investigator), was coming over and that Hy said something about calling and coming over to make sure that he had a list of people. Handman advised petitioner's father Hy had been given a new name. Handman further advised that he would come over within a half an hour or so.

(3) Handman spoke to the petitioner's mother and father (A298-300) while the petitioner was speaking on another phone line. There was an exchange of pleasantries until the petitioner got on the phone with Handman, reporting to Handman that Lt. Wellborn called about Effie May, the maid. This conversation is previously reported as a lawyer-client conversation.

(4) Handman called in and was advised by petitioner's father (A579-81) that the petitioner went to walk the dog. Handman asked that the petitioner tell his father about what Illis had said and requested that the petitioner call him back.

(5) Handman advised Mr. Pobliner, Sr. he had good news (A587-88) that Illis was asleep and the problem was over.

(6) Petitioner's father spoke with Handman (A1041-43) inquiring how much longer Handman and others would be at a house. Mr. Pobliner, Sr. stated that it was not

necessary to have the petitioner call him since he would take a "Michael" home.

(7) In another call (A1047), petitioner's father called Handman at this house again and the latter reported that the entire place was measured, photographed and a report was being made up, the parties to leave the house in a half hour.

In connection with the foregoing series of calls there were other conversations between petitioner and friends and his parents and their friends advising that Edelbaum, an investigator, and a criminologist, went out to the petitioner's home in Merrick (A273, A278-87, A1044, A1048, A1049, A1074, A1080, A1050, A1103).

(8) Handman called the petitioner's parents (A1082-86) to find out if everything was okay and he advised that the doctor said Illis could be visited at the hospital; that Illis was still sick and he Handman, had spoken to Illis' mother. Handman suggested that they speak in person on the next day and an appointment was arranged.

(9) Handman told Mrs. Pobliner Illis was still not good and that he, Handman, had some idea he wanted to discuss with Mr. Pobliner concerning what might be happening with the Grand Jury and he asked that Mr. Pobliner call him back. Handman further reported that the police were in North Carolina investigating and expressed the hope that it was another lead. Handman then discussed an unnamed person in Asheville who was a very jealous person who had moved away from the center of town. Handman said that they would discuss things when Jay returned (A1107-11).

(10) Handman advised Mr. Pobliner about an idea whereby they would request the petitioner to appear before

the Grand Jury in order to find out when it might be convening. Handman was not sure of this idea and said he would check it out with Maurice. The father questioned the wisdom of this idea. Handman advised the police had gone to Asheville again and he broached the possibility of sending a private detective to Asheville. It was arranged that they would get together on Friday and they would leave everything in abeyance until then (A1111-18).

(11) Handman called Mrs. Pobliner to speak with Mr. Pobliner who was not in. Handman advised that he had just spoken to Edelbaum and wanted to tell Mr. Pobliner, Sr. that there was nothing to worry about regarding the Grand Jury (A1120).

(12) Handman reported to Mr. Pobliner, Sr. that he had seen Mr. Edelbaum and that there was nothing new to report other than Mr. Edelbaum had stated they would know if the case was going before the Grand Jury because they would probably call Mr. Pobliner, Sr. to identify the body. Accordingly, Handman reported that there should be no surprise about the Grand Jury. Mr. Pobliner, Sr. suggested there would be a few things to check out with the investigator regarding tradesmen and Handman said that he would speak to Hy (A1130-34).

Appendix F

(Three Conversations between Investigator Rosenblatt and either of Petitioner's Parents)

(1) Mr. Rosenblatt told the petitioner's father (A247-256) he had been sick. This conversation is already reported (A249-256).

(2) The investigator telephoned the petitioner (A1184-1185) and petitioner's mother answered, advising that petitioner was still in an airplane which was circling over Newark. The investigator said he would call back later.

(3) The investigator telephoned the Pobliner residence and asked to speak to the petitioner. Petitioner's father answered the phone and turned the call over to petitioner (1242-1244).